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NO.

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

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MARKET/MEDIA RESEARCH, INC.,

Petitioner,

vs.

UNION TRIBUNE PUBLISHING COMPANY
and
THE COPLEY PRESS, INC.

Respondents.

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# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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## QUESTIONS PRESENTED FOR REVIEW

1. Does due process bar the exercise of jurisdiction over out-of-state defendants in a suit for breach of an interstate commercial contract, fraud, conversion, unjust enrichment and tortious interference with plaintiff's business relationships if (i) plaintiff "made the initial contact" and (ii) defendants "were never present in Ohio to conduct business" with plaintiff? Is the court of appeals' decision affirming the dismissal of plaintiff's action on these grounds in direct conflict with this Court's decisions in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985) and *Calder v. Jones*, 456 U.S. 783 (1984)?

2. Was the court of appeals bound by the *Erie* doctrine to follow the controlling decisions of the Ohio Supreme Court and Court of Appeals, *e.g.*, *Kentucky Oaks Mall Co. v. Mitchell's Formal Wear, Inc.*, 53 Ohio St.3d 73 (1990), *cert. denied*, 111 S.Ct. 1619 (1991), and *Cincinnati Art Galleries v. Fatzie*, 8 AOA 4 (1990), when the issue was decided without evidentiary hearing and defendants made no showing that the exercise of jurisdiction would be unreasonable? Was the due process issue properly reached?

3. Was the court of appeals bound to follow controlling circuit precedents which have repeatedly held that the grounds relied upon by this panel are "immaterial" and "irrelevant" to the exercise of personal jurisdiction, when no change in the substantive law and no intervening decision of this Court required their modification, and when the *en banc* court declined to reconsider the issue on petition for rehearing *en banc*?

4. Does the denial of personal jurisdiction in plaintiff's home forum deny plaintiff due process when the only other available forum is so dominated by the defendants as to render them effectively judgment proof there?

5. What is the duty of a court when a party asserts in a post-judgment motion that the court has based its decision on misrepresentations of fact and law made by opposing counsel?

## PARTIES AND CORPORATE AFFILIATIONS

All parties to the proceedings below are named in the caption.

Petitioner Market/Media Research, Inc., is an Ohio corporation with its principal and only place of business in Cuyahoga County, Ohio. MMR is neither the parent nor a subsidiary of any other corporation.

Respondent The Copley Press, Inc., is an Illinois corporation and respondent Union-Tribune Publishing Co. is an unincorporated operating division of Copley. Both respondents have their principal place of business in San Diego County, California.

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I. The decision of the court of appeals directly conflicts with the prior decisions of this Court, with controlling decisions of the Ohio Supreme Court and Court of Appeals, with binding precedents of the Sixth Circuit which this panel could not lawfully fail to follow, and with decisions of every other federal court of appeals.

Moreover, the panel's refusal to vacate an opinion which relied on material misstatements of MMR's factual allegations when those misstatements were brought to its attention on petition for rehearing so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory jurisdiction. ..... 15

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# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

---

Petitioner Market/Media Research, Inc. prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit affirming the district court's dismissal of petitioner's diversity action for lack of personal jurisdiction and the order denying a timely petition for rehearing and rehearing *en banc*.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit (A. 1) is reported at 951 F.2d 102. The order denying the petition for rehearing and rehearing *en banc* (A. 9) is unreported. The opinion of the United States District Court for the Northern District of Ohio (A. 10) is unreported.

## JURISDICTION

The judgment of the court of appeals was entered on December 13, 1991. A timely petition for rehearing with suggestion for rehearing *en banc* was filed on January 7, 1992, and the order denying that petition was entered on February 11, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

1. The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

...[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Ohio Revised Code § 2307.382 provides, in pertinent part:

(A) A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a cause of action arising from the person's:

(1) Transacting any business in this state;

***

(3) Causing tortious injury by an act or omission in this state;

***

(6) Causing tortious injury in this state to any person by an act or omission outside this state committed with the purpose of injuring persons, when he might reasonably have expected that some person would be injured thereby in this state;

(7) Causing tortious injury to any person by a criminal act, any element of which takes place in this state, which he commits or in the commission of which he is guilty of complicity.

***

(C) When jurisdiction over a person is based solely upon this section, only a cause of action arising from acts enumerated in this section may be asserted against him.

3. Ohio Civil Rule 4.3 provides, in pertinent part:

(A) When service permitted

Service of process may be made outside of this state, as provided herein, in any action in this state, upon a person who at the time of service of process is a nonresident of this state...The term "person" includes...a corporation...or any other legal or commercial entity, who, acting directly or by an agent, has caused an event to occur out of which the claim which is the subject of the complaint arose, from the person's:

(1) Transacting any business in this state;

***

(3) Causing tortious injury by an act or omission in this state...;

***

(9) Causing tortious injury in this state to any person by an act outside this state committed with the purpose of injuring persons, when he might reasonably have expected that some person would be injured thereby in this state;

(10) Causing tortious injury to any person by a criminal act, any element of which takes place in this state which he commits or in the commission of which he is guilty of complicity.

4. Ohio Revised Code § 2913.02 provides in pertinent part:

(A) No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services in any of the following ways:

***

(3) By deception;

***

5. 18 U.S.C. § 1341 provides as follows:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the

purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

6. 18 U.S.C. § 1343 provides as follows:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

7. Federal Rules of Civil Procedure 4 provides in pertinent part:

(e) Summons: Service Upon Party Not Inhabitant of or Found Within State. Whenever a statute of the United States or an order of court thereunder provided for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state in which the district court is held, service may be made under the circumstances and in the manner prescribed by the statute or order, or, if there is no provision therein prescribing the manner of service, in an manner stated in this rule. Whenever a statute or rule of court of the state in which the district court is held provides (1) for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state, or (2) for service upon or notice to him to appear and respond or defend in an action by reason of the attachment or garnishment or similar seizure of his property located within the state, service may in either case be made under the circumstances and in the manner prescribed in the statute or rule.

8. Federal Rules of Civil Procedure 11 provides as follows:

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

9. Federal Rules of Civil Procedure 12 (b) provides in pertinent part:

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: ... (2) lack of jurisdiction over the person, ...

10. Ohio Disciplinary Rule 7-102 provides in pertinent part:

(A) In his representation of a client, a lawyer shall not:

(1) File a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another.

(2) Knowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law.

(3) Conceal or knowingly fail to disclose that which he is required by law to reveal.

***

(5) Knowingly make a false statement of law or fact.

11. Ohio Disciplinary Rule 7-106 provides in pertinent part:

(A) A lawyer shall not disregard or advise his client to disregard a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding, but he may take appropriate steps in good faith to test the validity of such rule or ruling.

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(C) In appearing in his professional capacity before a tribunal, a lawyer shall not:

(1) State or allude to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence.

***

(4) Assert his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused; but he may argue, on his analysis of the evidence, for any position or conclusion with respect to the matters stated herein.

***

(7) Intentionally or habitually violate any established rule of procedure or of evidence.

## STATEMENT OF THE CASE

### Jurisdiction

The diversity jurisdiction of the district court was invoked under 28 U.S.C. 1332 by plaintiff Market/Media Research, Inc., an Ohio corporation which has its principal and only place of business in Cuyahoga County, Ohio, over defendants The Copley Press, Inc., an Illinois corporation, and its unincorporated operating division, Union-Tribune Publishing Co., each of which has its principal place of business in San Diego County, California.

Personal jurisdiction properly lies under four separate provisions of the Ohio long-arm statute, R.C. 2307.382 (A) (1), (3), (6) and (7). Service of process was effected under Ohio Civil Rule 4.3 (A) (1), (3), (9) and (10) in accordance with Fed.R.Civ.P. 4(e).

Defendants purposefully availed themselves of the privilege of transacting business in Ohio when, following extensive negotiations by telephone and mail with MMR in Ohio, defendants purposely entered into a substantial interstate commercial contract with MMR from which they expected a derive substantial benefit in the form of increased advertising revenues. Defendants obligated themselves to make regular monthly payments to MMR in Ohio, for services to be performed by MMR primarily in Ohio, during the course of a continuing business relationship. Defendants later breached that contract in communications directed to MMR in Ohio. R.C. 2307.382(A)(1), *Kentucky Oaks Mall Co. v. Mitchell's Formal Wear, Inc.*, 53 Ohio St.3d 73 (1990), *cert. denied*, ---U.S.---, 111 S.Ct. 1619 (1991); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985); *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957); *Travelers Health Assn. v. Virginia*, 339 U.S. 643 (1950).

Defendants committed intentional torts directed at MMR in Ohio when they made knowingly false promises to pay for MMR's services, obtained MMR's services and property as a proximate result of those promises, did not pay, and then falsely denied that they had either promised to pay or received the services and property, all in violation of R.C. 2913.02 (A)(3). Defendants used interstate mail and telephone calls to defraud MMR in violation of 18 U.S.C. 1341 and 1343. R.C. 2307.382 (A)(3) and (7). Defendants tortiously interfered with MMR's business relations with the J.C. Penney Co. in California by delaying the MMR/Penney demonstration project and

by causing Penney to withdraw from its agreement with MMR resulting in a loss of some $35 million to MMR. R.C. 2307.382(A)(6). *Fallang v. Hickey*, 40 Ohio St.3d 106, 107 (1988); *State, ex rel. Stone v. Court*, 14 Ohio St.3d 32 (1984); *Calder v. Jones*, 465 U.S. 783 (1984); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 773 (1984); *Cincinnati Art Galleries v. Fatzie*, 8 Anderson's Ohio App. Rpt. 4 (1990).

## STATEMENT OF THE FACTS [1]

Petitioner Market/Media Research, Inc. (MMR) developed a new technology to measure the effects of newspaper advertising on the behavior of shoppers in retail markets. By measuring and comparing a retailer's current performance with its potential in a particular market, MMR determines the level of advertising and the merchandising strategies required to maximize the retailer's sales and profits in that market and provides continuing consulting services to enable its clients to achieve and maintain optimal performance.

In 1987, MMR and the Newspaper Advertising Bureau (NAB) agreed to set up a series of demonstration projects with major retailers and the NAB's member newspapers. J.C. Penney Co. (Penney) agreed to participate and to select a test market.

On March 4, 1988, Gerry Wilson, marketing director of respondent Union-Tribune (Union), and other Union employees made a sales call on Larry D. Walker, Penney's western region advertising manager. (A. 71) During that meeting, Walker told Wilson about the MMR demonstration project and Wilson expressed the newspapers' interest in participating. Walker informed MMR's president Robert Rhodes of these developments on March 18, 1988, and suggested that Rhodes call Wilson directly.

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[1] This Statement of Facts is based on the two affidavits of MMR President Robert Rhodes (A. 26, 68), the uncontroverted allegations of the Amended Complaint (A. 18), the additional claims proffered in MMR's Second Amended Complaint,(A. 77) which the district court denied leave to file, and the defendants' limited purpose admissions which the courts below ingored.

## Pre-Contract Negotiations

Rhodes reached Wilson by telephone a week later on March 25, 1988. Wilson confirmed his discussion with Walker and asked how the project would work. Rhodes described the project and explained that the newspapers would pay for the research and that Penney would pay for increased advertising in the newspapers. Rhodes told Wilson that data from the field studies could also be used to develop similar demonstration projects with other non-competing retailers and in the newspapers' promotional materials.

Wilson reaffirmed the newspapers' interest in participating and asked how MMR wished to proceed. Rhodes suggested an exchange of pertinent printed materials, sending Wilson a copy of *THE EFFECTIVE RETAIL MARKET: Advertising, Shopping Behavior and the Bottom Line*[2] and receiving from Wilson copies of the newspapers' current promotional materials on the San Diego market.

The cover letter from Wilson dated March 31, 1988, addressed and mailed to MMR in Ohio, concluded: "After you've looked these over, please let me know how you want to proceed." (A. 37) The letter shows that from the outset the defendants were purposeful participants in interstate business transactions with MMR, which they knew to be an Ohio company.

## The Defendants' Offer

After reviewing the printed materials, Rhodes and Wilson discussed the project again by telephone on April 15, 1988. Rhodes suggested a meeting with Wilson and anyone else who needed to be involved in the discussion to conclude an agreement. Wilson said a meeting would be unnecessary because the newspapers had decided to go forward with the project provided Penney wanted to do it and would agree to buy enough additional advertising to allow the newspapers to recover the costs of the research. (A. 69, 28) Rhodes promised to talk to Walker and Wilson told Rhodes to proceed with development of the proposal for Penney and to offer as options any additional services MMR believed would benefit the newspapers.

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[2] Included in the Joint Appendix filed in the Court of Appeals.

## MMR's Acceptance

In reliance on Wilson's representations, Rhodes informed Penney of Wilson's offer, obtained an initial commitment from Penney for $300,000.00 in additional advertising to pay for the research, prepared the project proposal and submitted it to Penney. MMR obtained final approval from Penney on May 24, 1988, thus accepting by performance the unilateral offer made by the defendants on April 15, 1988.

On May 24, 1988, Rhodes sent Wilson a letter enclosing a copy of the approved project proposal and the Services Agreement which memorialized the parties' contract. The first sentence of the Services Agreement states that it is "made at Cleveland, Ohio" between the defendants and MMR, which is identified as an Ohio corporation. (A. 22) The letter asked Wilson to advise MMR if there were any questions regarding the Services Agreement. (A. 39).

On June 2, 1988, Rhodes sent Wilson a progress report and asked Wilson to check the enclosed lists of stores and locations to be used in the field study. (A. 53)

## Defendants Negotiate Modification, Parties Agree Orally to Services Agreement

On June 15, 1988, Rhodes and Wilson discussed the project by telephone. Wilson acknowledged receiving the store lists, but said he had doubts about the willingness of Penney to commit the additional $300,000.00 in advertising to the newspapers. Rhodes told Wilson that Penney's commitment was firm and that Wilson could verify that fact by calling Walker. Wilson then reaffirmed the defendants' decision to go forward with the project and said that the corporate marketing and research staff would handle the project for the newspapers from that time on. Wilson said he understood MMR was a consulting firm rather than a field service, that the Copley corporate staff purchased field services for all the Copley newspapers and might prefer to pay MMR a consulting fee and contract for the field work directly. Rhodes agreed to modify the Services Agreement if Copley could get a better price from a competent field service. The formality of signing the Services Agreement was thus deferred until Copley could obtain a price quotation. MMR received a letter from Union on

June 22, 1988, which it understood to confirm the June 15 conversation with Wilson. (A. 55)

**MMR's Dealings with Copley**

On June 30, 1988, Rhodes spoke to Copley marketing director Stuart Neffler. Rhodes reviewed the Penney project, told Neffler of Union's agreement to pay the research costs in return for the increase in advertising from Penney, and explained the urgency of getting the field study underway. Neffler did not dispute either the existence or the substance of the agreement with Union.

On July 7, 1988, Rhodes received a telephone call from Daniel McGuckin, a member of Neffler's staff, which lasted for 55 minutes. McGuckin reviewed the Services Agreement section by section, discussed the details of the research methodology and the questions to be asked. At the conclusion of the conversation, McGuckin asked Rhodes to send him the completed study design and a copy of Rhodes's June 2 letter to Wilson enclosing the store lists. Paragraph 4.2 of the Services Agreement provides that half the Survey Fee of $143,500.00 would be due and payable upon completion of the study design. (A. 49)

Relying on the defendants' representations, and believing that they intended to pay, MMR sent the requested materials which Copley acknowledged receiving. The completion of the study design represented substantial performance by MMR under the terms of the Services Agreement.

Between July 13 and August 24, 1988, Copley requested and MMR provided a detailed financial analysis of the consequences of the Penney advertising increase. Copley agreed to cooperate fully with the project as designed by MMR and so advised Wilson. (A.56)

The defendants had at least two more discussions with Penney in August and at the end of each assured Penney that they were going forward with the MMR project.

**Defendants' Breach of Contract**

After telling Penney's Walker on August 29, 1988, that the newspapers intended to go forward with the MMR project and would call Rhodes to get the field study underway, Wilson, in a

conversation with Rhodes on September 6 repudiated the contract, telling Rhodes, "Look, we're just jerking you around." Saying there was "no longer any urgency" to the project, Wilson said the defendants would not pay MMR. Rhodes informed Wilson that MMR had performed its obligations under their agreement and expected the newspapers to do likewise.

On September 7, 1988, Rhodes sent Wilson an invoice for the first installment of the Survey Fee and a letter memorializing their telephone conversation the previous day. Defendants failed and refused to pay the invoice. MMR contends that these facts sufficiently show that the defendants transacted business in Ohio within the meaning of R.C. 2307.382(A)(1) and under this Court's decision in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985), the exercise of jurisdiction comports with the requirements of due process.

### Defendants' Tortious Conduct [3]

MMR alleges that the defendants' repeated promises to pay for MMR's services were knowingly false, that defendants knew that MMR was relying and had a right to rely on its promises, that MMR in consequence of those promises spent several months developing the research study and obtaining from Penney the commitment to increase its advertising in defendants' newspapers, and that MMR suffered damage and financial loss as a result of defendants' fraudulent conduct. (A.20, 35-36)

After receiving the approved project proposal and Services Agreement on May 25, 1988, but before they requested the completed study design on July 7, defendants created a two-page undated, unsigned memorandum which they admit was written either by Copley research manager Thomas Copeland or analyst Daniel McGuckin. (A. 73) It is clear from the document that the author had received the project proposal, because the memorandum attempts to

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[3] Although the opinion of the court of appeals acknowledges that MMR stated claims for "fraud, conversion and related torts," 951 F.2d at 103, (A 1), and for "fraud, conversion, unjust enrichment and damage to MMR's business relationship with Penney," *Id.* at 104, (A. 3), both the district court and the court of appeals completely ignored MMR's allegations of defendants' tortious conduct as a basis for the exercise of personal jurisdiction. (A. 83).

summarize its contents, although the "summary" is materially inaccurate. The memorandum states that the author has not seen the questionnaire for the field study, putting the date of its creation sometime before July 7, 1988, when McGuckin telephoned MMR to request that a copy be sent. Notwithstanding, the unidentified author undertakes to appraise it sight unseen. The memorandum concludes with the statement:

> It is our opinion the MMRI should not be retained for this project or as a consultant. For the most part, our internal studies already cover most of what was proposed. The rest of what he is proposing is non-sense (sic) or can be accomplished by ourselves.

Copley did not inform MMR of this development, however. Instead, Copley's McGuckin telephoned Rhodes on July 7, engaged in a 55-minute discussion of the project and the Services Agreement and then requested that MMR forward the completed study design. In reliance on the defendants' promises to pay, MMR sent the requested materials and Copley received them. (A. 31) Copley later agreed to cooperate fully with the project. Defendants represented to Penney, however, that they could do the project themselves. (A. 81) When Penney refused, the defendants assured Penney they would go forward with the MMR project, but informed MMR (falsely) that Penney had backed out. (A. 34)

On September 6, 1988, Wilson told Rhodes, "Look, we're just jerking you around," repudiated the contract and said the defendants would not pay MMR for its work. (A. 35) On October 3, 1988, Copley's general counsel addressed and mailed to MMR in Ohio a letter that falsely denied that the defendants had ever made any promise to pay, or that they had ever received anything of value from MMR. (A. 66) This letter establishes the corporate defendants' ratification of their employees' bad faith and fraudulent conduct.

The defendants' bad faith delayed the project for months, preventing MMR and Penney from moving the demonstration project to another market and later persuaded Penney that such a project with newspapers was unworkable, proximately causing MMR a loss of some $35 million.

MMR contends that these allegations are sufficient to bring the defendants' conduct within the reach of R.C. 2307.382(A)(3), (6) and (7), and that under this Court's decision in *Calder v. Jones*, 465 U.S. 783 (1984), the exercise of jurisdiction comports with the requirements of due process.

## DISPOSITION IN THE COURTS BELOW

### District Court

In deciding the motion to dismiss, the district court disregarded MMR's complaint and affidavits and adopted as the "relevant jurisdictional facts" an almost verbatim abridgement of an unsupported, fictional account of the parties' dealings presented in the defendants' brief. (A. 86-89) MMR filed a timely motion for reconsideration calling the defendants' factual misstatements to the court's attention and proffering a Second Amended Complaint (A. 77) which elaborated MMR's allegations and presented an additional claim.

Defendants filed a brief opposing reconsideration but were unable to substantiate even one of the fictional "facts" upon which the court had based its opinion. At that point, MMR filed a Reply in which it sought Rule 11 sanctions for defendants' persistent misrepresentations.

The district court denied the motion for reconsideration by marginal entry order, without investigating MMR's claim that the court had based its decision on false statements of fact and law made by defendants' counsel in support of the motion to dismiss.

MMR appealed both the order dismissing the action and the order denying reconsideration and leave to file the Second Amended Complaint.

### Court of Appeals

The court of appeals based *its* decision on a garbled account of MMR's allegations which omitted material facts actually alleged, transposed events in time in a way that materially altered their legal significance, adopted false statements from the defendants' appellate brief in contradiction of the documentary evidence, and

relied on "characterizations" of MMR's allegations which are, to put the matter as politely as possible, wholly unsupported by the record.[4]

## REASONS FOR GRANTING CERTIORARI

**I. The decision of the court of appeals directly conflicts with the prior decisions of this Court, with controlling decisions of the Ohio Supreme Court and Court of Appeals, with binding precedents of the Sixth Circuit which this panel could not lawfully fail to follow, and with decisions of every other federal court of appeals.**

**Moreover, the panel's refusal to vacate an opinion which relied on material misstatements of MMR's factual allegations when those misstatements were brought to its attention on petition for rehearing so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory jurisdiction.**

**A. The court of appeals' holding that due process bars exercise of jurisdiction on claims that MMR was injured by intentionally tortious conduct of defendants directed at MMR in Ohio if (i) MMR "made the initial contact" in the underlying business transaction and (ii) defendants were not physically present in Ohio when they made the false representations which caused the injury is directly in conflict with this Court's decision in *Calder v. Jones*, 465 U.S. 783 (1984).**

In *Calder*, the Court held:

> ...An individual injured in California need not go to Florida to seek redress from persons who, though remaining in Florida, knowingly cause the injury in California...In this case, petitioners are primary participants in an alleged wrongdoing

[4] In a timely petition for rehearing and rehearing *en banc*, MMR documented the panel's misstatements and mischaracterizations of MMR's factual allegations with detailed references to the record. The court of appeals, nevertheless, refused to withdraw an opinion which does not accord with the facts of record.

intentionally directed at a California resident, and jurisdiction over them is proper on that basis. *Id.* at 790.

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We hold that jurisdiction over petitioners in California is proper because of their intentional conduct in Florida calculated to cause injury to respondent in California. *Id.* at 791.

This holding would seem to foreclose any contention that "assertion of jurisdiction in this case would not be consistent with due process." MMR alleges fraud and conversion of its services and property and tortious interference with its business relationship with Penney. These are all allegations of wrongdoing by defendants in California intentionally directed at MMR in Ohio and calculated to cause injury to MMR in Ohio.

When the "intentional conduct...calculated to cause injury" in the forum state is the theft of the plaintiff's services and property by deception in violation of a state criminal statute, R.C. 2913.02 (A)(3), accomplished by means of false statements directed into the forum state by interstate telephone calls and mail in violation of federal criminal statutes, 18 U.S.C. § 1343 and 1341, the exercise of long-arm jurisdiction by the forum state would seem to be particularly appropriate.

During a sales call made by defendants on J.C. Penney, defendants learned that Penney was interested in finding a market for a demonstration project with MMR. Defendants expressed their interest in participating in a project in San Diego. Penney informed MMR and MMR telephoned the defendants who confirmed those facts. By false promises to pay for its services, defendants induced MMR to design a demonstration project for the San Diego market and to send the design to the defendants. Defendants delayed the project and prevented MMR's further performance, then represented to Penney that they could do the project themselves without MMR, falsely represented to MMR that Penney had backed out of the agreement, and finally falsely denied that the defendants had either promised to pay MMR or had received "anything of value" from MMR. *Cf. United States v. Spiro*, 385 F.2d 210 (7th Cir. 1967).

Although stating in its opinion, 951 F.2d at 105 (A. 5), that "Dismissal is warranted only if all of the facts the plaintiff asserts 'collectively fail to state a prima facie case for jurisdiction...'"

the court of appeals completely disregarded MMR's allegations of tortious conduct.

The Ohio long-arm statute contains three provisions which clearly cover the defendants' tortious conduct in this case. R.C. 2307.382(A) extends to causes of action arising from an out-of-state defendant's:

(3)Causing tortious injury by an act or omission in this state;

(6)Causing tortious injury in this state to any person by an act outside this state committed with the purpose of injuring persons, when he might reasonably have expected that some person would be injured thereby in this state;

(7)Causing tortious injury to any person by a criminal act, any element of which takes place in this state, which he commits or in the commission of which he is guilty of complicity.

The Ohio Supreme Court has held that torts inflicted through interstate telephone calls or mail directed into Ohio from another state are torts committed "in this state" within the meaning of R.C. 2307.382(A)(3). *Fallang v. Hickey*, 40 Ohio St.3d 106, 107 (1988). In *State, ex rel. Stone v. Court*, 14 Ohio St.3d 32, 33, *per curiam*, (1984), the court held that R.C. 2307.382(A)(6) reaches out-of-state acts that cause injury within the state.

Neither the Ohio Supreme Court nor the court of appeals has construed subsection (7) directly, but the Ohio Supreme Court has consistently held that the language of the long-arm statute should be given its "plain and common meaning", *e.g.*, *Kentucky Oaks Mall Co. v. Mitchell's Formal Wear, Inc.*, 53 Ohio St.3d 73 (1990), *cert. denied*, 111 S.Ct. 1619 (1991). Clearly the crucial element of the crime of theft by deception--the deception of MMR by the defendants' false promises--took place in Ohio.

**B. The court of appeals' holding that due process bars exercise of jurisdiction over defendants in Ohio on MMR's contract claims if MMR (i) "made the initial contact" in the negotiations and (ii) defendants "were never present in Ohio to conduct business with MMR" is in direct conflict with this Court's decision in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985).**

In *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985), this Court observed that:

> ...with respect to interstate contractual obligations, we have emphasized that parties who "reach out beyond one state and create continuing relationships and obligations with citizens of another state" are subject to regulation and sanctions in the other State for the consequences of their activities. *Travelers Health Assn. v. Virginia*, 339 U.S. 643, 647 (1950). See also *McGee v. International Life Insurance Co.*, 355 U.S. 220, 222-223 (1957). *Id.* at 473.

The "initial contact" in *Burger King* was not made by Rudzewicz, but by Brian MacShara, who proposed that Rudzewicz put up the money for a Burger King franchise, which MacShara would operate, in return for half the profits. 471 U.S. at 466. And with respect to the need for a defendant's physical presence in the forum state, the Court said:

> ...So long as a commercial actor's efforts are "purposefully directed" toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there. *Keeton v. Hustler Magazine, Inc., supra*, [465 U.S.] at 774-775; see also, *Calder v. Jones*, 465 U.S., at 788-790; *McGee v. International Life Insurance Co.*, 355 U.S. at 222-223. *Cf. Hoopeston Canning Co. v. Cullen*, 318 U.S. 313, 317 (1943). 471 U.S. at 476.

*Accord, Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 112 (1987).

Thus *Burger King* would seem to foreclose any contention that "assertion of jurisdiction in this case would not be consistent with due process," since MMR certainly alleged the existence of "interstate contractual obligations," created by the defendants (who made the initial contract offer), and breached by the defendants, who failed to make the required payments to MMR in Ohio, thereby injuring MMR in Ohio.

The court of appeals attempted to explain those allegations away by declaring (possibly as a third ground) that "Defendants never intended to execute a contract in Ohio." 951 U.S. at 105 (A. 6) That statement is so bizarre that West's editors did not even include it as a possible ground for the decision in the headnote. *Id.* at 103. The statement flatly contradicts the first sentence of the parties' written agreement[5] which begins: "This agreement, made at Cleveland, Ohio,...by and between MARKET/MEDIA RESEARCH, INC., an Ohio corporation..." (A. 22 ) Obviously the court of appeals was not at liberty to ascribe to the defendants an intent different from that expressed in their written agreement. *Blosser v. Enderlin*, 113 Ohio St. 121 (1925); *Latina v. Woodpath Development Co.*, 57 Ohio St. 3d 212, 214 (1991). *Cf. Carnival Cruise Lines, Inc. v. Shute*, -- U.S. --, 111 S. Ct. 1522 (1991).

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[5] While it is not material to the jurisdiction issue, *Bell v. Hood, 327 U.S. 678, 682 (1947)* and *Burks v. Lasker*, 441 U.S. 471, 476 fn 5 (1979), the courts below apparently based their decisions on the erroneous belief that a contract does not exist between the parties until a written document memorializing the agreement is signed by them. That, however, is not the law. *Hamilton Foundry & Machine Co. v. Int'l. Molders and Foundry Workers Union*, 193 F.2d 209, (6th Cir. Ohio), *cert. denied*, 343 U.S. 966 (1962). Rhodes attested that the parties agreed orally to the Services Agreement as modified in the telephone conversation on June 15, 1988. (A. 30) The fact that the contract depended on an advertising contract to be subsequently entered into by the defendants and Penney does not make the contract between the defendants and MMR any less valid and enforceable. *Blaney and Morgan v. Hoke*, 14 Ohio St. 292 (1863), ¶ 2 of the syllabus. Nor does the fact that the parties intended that their agreement ultimately be reduced to writing make it any less binding. *Id.*, ¶ 1 of the syllabus. Here, the signing was delayed by the *defendants'* request for a modification to permit them to contract directly with the field service, if they could get a better price for the interviewing than MMR could. (A. 30) This quotation could only be obtained after the study design was complete. The parties clearly contemplated that substantial performance by MMR would take place prior to the formal signing. See 17 Ohio Jur 3d, Contracts, § 80-83.

In any event, a motion to dismiss under Rule 12(b)(2) does not "challenge the intendment of the complaint," *Hugel v. McNell*, 886 F.2d 1, 5 fn.4. (1st Cir. 1989), since a Rule 12(b) motion "assumes that general allegations embrace those specific facts that are necessary to support the claim." *Lujan v. National Wildlife Federation*,---U.S.---, 110 S.Ct. 3177, 3189 (1990) (citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). And in a jury case, what the parties "intend" by their words and actions is a question for the jury and not for judges, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

The relevant teaching of *Burger King* is that the "place of contracting or performance" is not itself of jurisdictional significance. 471 U.S. at 478. Rather, such a contract provision is material to jurisdiction because it gave sufficient notice to defendants that they were entering into a substantial interstate contractual relationship with an Ohio corporation. *Id.* at 480. MMR alleges that defendants proposed a single modification to the Services Agreement involving the subcontract with a field service, but otherwise agreed orally to the Services Agreement as drafted in a telephone conversation on June 15, 1988.

### C. The decision of the court of appeals conflicts with decisions of the Ohio Supreme Court and with the courts of appeals of every federal circuit.

The panel decision with regard to due process conflicts with the following decisions of the Ohio Supreme Court: *Kentucky Oaks Mall Co. v. Mitchell's Formal Wear, Inc.*, 53 Ohio St.3d 73 (1990), *cert. denied*, 111 S.Ct. 1619 (1991) (out-of-state defendant who negotiates by telephone and mail and thereby becomes obligated to make payments to resident transacts business in Ohio, relying on *Burger King*); *Fallang v. Hickey*, 40 Ohio St.3d 106 (1988) (one who causes injury in Ohio by transmitting libelous letter by interstate mail commits tort in Ohio, relying on *Burger King*, *Calder* and *Keeton*).

The decision also conflicts with the decisions of every federal court of appeals. *Villa Marina Yacht Sales v. Hatteras Yachts*, 915 F.2d 7, 11 fn.6 (1st Cir. 1990) (relying on *Burger King*); *Hargrave v. Oki Nursery, Inc.*, 636 F.3d 897, 900 (2nd Cir. 1980) (in fraud case, injury occurs where misrepresentation received); *Retail Software*

*Services, Inc. v. Lashlee*, 854 F.2d 18, 23 (2nd Cir. 1988) (minimum contacts in contract case, relying on *Burger King*, *Calder* and *Keeton*); *Paolino v. Channel Home Centers*, 668 F.2d 721, 724 (3rd Cir. 1981) (tort out/harm in); *Peanut Corp. of America v. Hollywood Brands, Inc.*, 696 F.2d 311, 314 (4th Cir. 1982) (contract negotiated by telephone and mail); *Pittsburgh Terminal Corp. v. Mid Allegheny Corp.*, 831 F.2d 522, 525, 528-530 (4th Cir. 1987).

Also, *Bullion v. Gillespie*, 895 F.2d 213, 216-217 (5th Cir. 1990) (contract and tort, contacts by telephone and mail sufficient); *Lanier v. American Bd. of Endodontics*, 843 F.2d 901, 910 (6th Cir. 1988), *cert. denied*, 488 U.S. 926 (1988) (which party "solicited the business interface" and physical presence of defendant in forum state "irrelevant", relying on *Burger King*); *Jacobs/Kahan & Co. v. Marsh*, 740 F.2d 587, 589 fn. 1 (7th Cir. 1984) (contract and tort case, "record is silent as to whether the contractual relationship in issue was initiated by plaintiff, defendants or a third party"); *FMC Corp. v. Varonos*, 892 F.2d 1308, 1313-1314 (7th Cir. 1990) (fraud and tortious interference by telex).

Also, *U.S. Ry. Equip. Co. v. Port Huron & Detroit Ry. Co.*, 495 F.2d 1127, 1129-30 (7th Cir. 1974) (plaintiff initiated transaction, defendants not present in forum to conduct business); *Electro-Craft Corp. v. Maxwell Electronics Corp.*, 417 F.2d 365, 369 (8th Cir. 1969) (defendants never present in forum, plaintiff initiated negotiations, contract not "consummated" in forum, following *Southern Machine Co. v. Mahasco Industries, Inc.*, 401 F.2d 374 (6th Cir. 1968)); *Brainerd v. Governors of the Univ. of Alberta*, 873 F.2d 1257, 1258-1260 (9th Cir. 1989) (breach of contract, bad faith, tortious interference and defamation case in which third party "initiated" telephone call in which defamatory statements were made, relying on *Burger King*, *Calder* and *Keeton*); *Hirsch v. Blue Cross, Blue Shield of Kansas City*, 800 F.2d 1474, 1478-1480 (9th Cir. 1986) (defendant purposefully directed activity toward forum when it agreed to provide coverage to new group member there).

The Ninth Circuit cases are particularly pertinent to due process analysis, because it is clear that jurisdiction would lie in California courts over MMR under identical facts if MMR had committed intentional torts which had injured the defendants. Surely the Constitution cannot permit one state to exercise jurisdiction and deny jurisdiction to another.

Also, *Kennedy v. Freeman*, 919 F.2d 126, 128-129 (10th Cir. 1990) ("Whether a party solicited the business interface is irrelevant, so long as defendant then directed its activities to the forum;" following the Sixth Circuit decision in *Lanier*, 843 F.2d at 910); *Pedi Bares, Inc. v. P & C Food Markets, Inc.*, 567 F.2d 933, 936-937 (10th Cir. 1977) (plaintiff made initial contact, there was partial performance and defendants were barred by doctrine of promissory estoppel from denying the contract); *Cable/Home Communication v. Network Productions*, 902 F.2d 829, 858-859 (11th Cir. 1990) (purposeful direction test, relies on *Burger King*); *Koteen v. Bermuda Cablevision, Ltd.*, 913 F.2d 973, 975 (D.C. Cir. 1990) (minimum contacts in professional fee collection case).

The Court should not permit the instant decision to stand and thus create needless conflict with well-settled law.

## II. The court of appeals was bound by the *Erie* doctrine to follow the controlling decisions of the Ohio Supreme Court and Court of Appeals when deciding a personal jurisdiction challenge under Rule 12(b)(2) without an evidentiary hearing.

When personal jurisdiction is challenged by a Rule 12(b)(2) motion to dismiss, the plaintiff's burden is met by a *prima facie* showing that the activities of the out-of-state defendants fall within the literal reach of the state's long-arm statute. *Welsh v. Gibbs*, 631 F.3d 436, 438 (6th Cir. 1980), *cert. denied*, 450 U. S. 981 (1981); *O'Hare Int'l. Bank v. Hampton*, 437 F.2d 1173, 1176 (7th Cir. 1971); *United States v. Montreal Trust Co.*, 358 F.2d 239 (2nd Cir. 1966).

This is so because a Rule 12(b) motion is a test of the sufficiency of a pleading. Since lack of jurisdiction over the person is a defense that may be waived, a plaintiff is not required to plead personal jurisdiction in a complaint. If challenged, however, he must make a *prima facie* showing that jurisdiction *exists*.

The *existence* of jurisdiction is a matter of state law, and on that question a federal court is bound by the decisions of the state courts. *E.g., Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 413 fn.7 (1984) ("It is not within our province, of course, to determine whether the Texas Supreme Court correctly interpreted the States's long-arm statute.")

The controlling case law, therefore, is found in three Ohio Supreme Court cases and one post-*Kentucky Oaks* decision of the Ohio Court of Appeals applying that case. These are, *Kentucky Oaks Mall Co. v. Mitchell's Formal Wear, Inc.*, 53 Ohio St.3d 73 (1990), *cert. denied*, 111 S.Ct. 1619 (1991) (construing R.C. 2307.382(A)(1), transacting business in the state. The court, relying on *Burger King* and *McGee*, found jurisdiction exists when a non-resident "negotiates" a commercial transaction with a resident "and through the course of dealing becomes obligated to make payments...in Ohio."); *Fallang v. Hickey*, 40 Ohio St.3d 106 (1988) (construing Civ.R. 4.3(A)(3) and holding that a tort is committed within the state when a defamatory letter is transmitted into the state by interstate mail); *State, ex rel. Stone v. Court*, 14 Ohio St.3d 32 (1984) (holding that R.C. 2307.382(A)(6) authorizes jurisdiction over out-of-state actors who purposefully cause injury in Ohio by wrongful acts outside the state); and *Cincinnati Art Galleries v. Fatzie*, 8 AOA 4 (1st Dist. 1990) (which applied *Kentucky Oaks* and held that a non-resident transacted business in Ohio when he responded to an advertisement by the art gallery and entered into a contract negotiated by telephone and mail to sell an art work which he falsely represented to be an original and was subject to jurisdiction in Ohio under R.C. 2307.382(A)(1) and Civ.R. 4.3(A)(1), citing Sixth Circuit precedents.)

As this Court recently observed, *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938)

> "...guarantees a litigant that if he takes his state law cause of action to federal court, and abides by the rules of that court, the result in his case will be the same as if he had brought it in state court." *Chambers v. NASCO, Inc.*,---U.S.---, 111 S.Ct. 2123, 2127 (1991) (quoting the Fifth Circuit opinion, 894 F.2d at 706.)

When the court of appeals disregarded the controlling decisions of the Ohio courts in an Ohio diversity action and instead applied Michigan decisions interpreting the Michigan long-arm statute, 951 F.2d at 106 (A. 7) (misstating a holding of *Serras v. First Tennessee Bank Nat'l. Assn.*, 875 F.2d 1212, 1216-1217 (6th Cir. 1989), which was clearly based on state law), it violated the *Erie* doctrine.

We respectfully suggest that the court of appeals has wholly misconceived the purpose of a Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction. If A, a resident of Maine, enters into an interstate contract with B, a resident of Kansas, and if A subsequently moves to California, A cannot force B to defend a suit for breach of that contract in California because the contract has no substantial connection with California. Rule 12(b)(2) provides B a means of asserting the defense of lack of personal jurisdiction in California. If A owns a business or a piece of real estate in Texas and meets with B there to negotiate a sale, B cannot sue A in Kansas for misrepresentations made in Texas which do not affect Kansas. Rule 12(b)(2) provides A a means of asserting the defense of lack of personal jurisdiction in Kansas. What Rule 12(b)(2) does *not* do is provide any party with a vehicle for challenging the merits of the underlying claims solely by means of false representations of fact made in a brief unsupported by evidence, which is what the defendants did in this case.

MMR alleged that the defendants entered into a substantial interstate contract for an Ohio plaintiff's services which the defendants breached. MMR further alleged that it was injured in Ohio by frauds and other intentional torts committed by the defendants. Defendants filed a Rule 12(b)(2) motion to dismiss in which they contended that they never made the promises attributed to them by MMR and launched a vituperative, *ad hominem*, attack on MMR unsupported by evidence. They asked the court to dismiss the action for lack of jurisdiction on the basis of those misrepresentations. (A. 83-85)

The teaching of *Burger King* is that once the plaintiff has established that jurisdiction under the state's long-arm statute *exists*, *i.e.*, that defendants have purposefully directed their efforts toward the forum state, the defendants may properly challenge the exercise of jurisdiction, if, under the specific circumstances of the case, the exercise of jurisdiction would be unreasonable, but, to succeed, the defendants must make a "compelling case" to defeat jurisdiction. *Burger King*, 471 U.S. at 476-477.

Had defendants made a factual showing of "some other considerations" which would make the exercise of jurisdiction unreasonable, dismissal would have been appropriate if the plaintiff had failed to offer any evidence to rebut that showing. Where opposing affidavits are submitted, the motion to dismiss must be denied,

*Theunissen v. Matthews*, 935 F.2d 1454, 1459 (6th Cir. 1991), unless factual disputes, independent of the merits of the causes of action, can be resolved by an evidentiary hearing. *Serras*, 875 F.2d at 1215.

Since the defendants made no effort at all to establish, or even suggest, "some other considerations" which would make the *exercise* of jurisdiction unreasonable, the due process issue was never properly reached. *Carnival Cruise Lines, Inc. v. Shute*, --U.S. --, 111 S.Ct. 1522, 1525 (1991); *Spector Motor Company v. McLaughlin*, 323 U.S. 101, 105 (1944). Defendants simply made legally frivolous arguments which ignored existing law, and the court of appeals adopted them in violation of controlling precedents which it could not lawfully refuse to follow.

**III. The court of appeals was bound to follow controlling Circuit precedents which have repeatedly held that the grounds relied upon by this panel are "immaterial" and "irrelevant" to the exercise of personal jurisdiction. No change in substantive law and no intervening decision by this Court required their modification and the *en banc* court declined to reconsider the issue on petition for rehearing *en banc*.**

The panel's decision that due process bars exercise of jurisdiction if (i) "MMR made the initial contact" and (ii) "Defendants were never present in Ohio to conduct business with MMR" is in direct conflict with binding precedents of the Sixth Circuit which the panel could not lawfully refuse to follow. *Raley v. Parke*, 945 F.2d 137, 141 (6th Cir. 1991) ("Even if Kentucky's argument were correct, it would be beyond our power to overrule the specific holding of a prior panel."); *Salmi v. Secretary of Health and Human Services*, 774 F.2d 685, 689 (6th Cir. 1985) ("A panel of this Court cannot overrule the decision of another panel. The prior decision remains controlling authority unless an inconsistent decision of the United States Supreme Court requires modification of the decision or this Court sitting en banc overrules the prior decision."); *Smith v. United States Postal Service*, 766 F.2d 205, 207 (6th Cir. 1985) ("...we are bound to follow...controlling Circuit precedent absent a change in the substantive law or an intervening Supreme Court decision."

As in *Raley*, a petition for rehearing *en banc* was denied (A. 9). The panel was therefore obligated by law to follow circuit precedents and vacate its own opinion which is in direct conflict.

The issues presented here were first addressed by the Sixth Circuit in its leading case on personal jurisdiction, *Southern Machine Co. v. Mohasco Industries, Inc.*, 401 F.2d 374 (1968):

> ...Has Mohasco purposefully availed itself of the privilege of transacting business in Tennessee? In considering this question, we can first dispose of those matters that are immaterial...Physical presence of an agent is not necessary, however, for the transaction of business in a state...Similarly, the contention that Southern Machine solicited the license agreement from Mohasco is immaterial...Likewise, the technicalities of the execution of the contract...cannot change the business realities of the transaction. *Id.* at 382.

The same issues were addressed in *In-Flight Devices Corp. v. Van Dusen Air, Inc.*, 466 F.2d 220 (1972), when the court considered personal jurisdiction in a case in which the defendant was the *buyer* in the transaction:

> ...Again it must be emphasized that no particular type of physical contact is required as a jurisdictional prerequisite. A letter or telephone call may, in a given situation, be as indicative of substantial involvement with the forum state as a personal visit by the defendant or its agents... *Id.* at 235.
>
> ...In our economy the seller often initiates the deal....
>
> The mere fact that a buyer is the defendant in a long-arm situation should not preclude an assertion of jurisdiction over such defendant, however...To the extent the buyer vigorously negotiates, perhaps dictates, contract terms...it would seem that any unfairness which would normally be associated with the exercise of long-arm jurisdiction over him disappears. Such buyer conduct is far more typical in dealings between large business organizations, of course... *Id.* at 233.

> ...In this Circuit one has "acted" so as to transact business in a state "when obligations created by the defendant or business operations set in motion by the defendant have a realistic impact on the commerce of that state..."
>
> The making of a substantial business contract with a corporation based in another jurisdiction has been held to be adequate to satisfy the "purposeful test of *Southern Machine*..."
>
> We believe that this holding represents a proper approach. *Id.* at 226-227.

*In-Flight* was followed in *First Nat'l Bank of Louisville v. J.W. Brewer Tire Co.*, 680 F.2d 1123 (1982). The "initial contact" in *Brewer* was made by a third party. *Id.* at 1124. The defendant was not physically present in the forum state. *Id.* at 1125. Quoting *In-Flight* and *Southern Machine*, the court held that entering into a substantial contract with a corporation in another jurisdiction constitutes "purposeful availment." The breach of the contract satisfies the requirement that the cause of action arise out of the defendant's activities in the forum, and a rebuttable inference arises that the exercise of jurisdiction is reasonable. Thus *Brewer* appears to have anticipated the balance struck by this Court in *Burger King*. 471 U.S. at 476-478.

Most recently the Sixth Circuit addressed these issues in *Lanier v. American Bd. of Endodontics*, 843 F.2d 901, 910, *cert. denied*, 488 U.S. 926 (1988):

> ...Physical presence is irrelevant. "So long as a commercial actor's efforts are 'purposefully directed' toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there." *Id.* (quoting *Burger King*, 471 U.S. at 475-476.)
>
> At this juncture, it is worthwhile to point out that the question of which party solicited the business interface is irrelevant, so long as the defendant then directed its efforts to the forum resident. *Southern Machine Co.*, 401 F.2d at 382. Thus, the defendants' contention that they did not solicit Lanier's application is irrelevant.

Nothing in the case *sub judice* warrants the panel's disregard for controlling precedent. It merely produces the intolerable result that, in the Sixth Circuit, the physical presence of a defendant in the forum and which party "initiated" the business relationship are either wholly "irrelevant" and "immaterial" to the exercise of jurisdiction or else they are wholly decisive and render the exercise of jurisdiction unconstitutional -- take your pick. The conflict is patently violative of the equal protection clause.

The law is not immutable, of course, and a party who believes that a question of law has been wrongly decided may ask the courts to change the law. Both Rule 11 and the Disciplinary Rules specifically provide that good faith arguments may be advanced for change of the existing law.

The lawyer seeking such a change, however, must state what the existing law is and then argue why it should be changed. The rules do not allow the lawyer simply to disregard or misrepresent the existing law. Nor may a court bound by precedents or the decisions of a higher court ignore them and thus shift the formidable burden of obtaining *en banc* review or a writ of certiorari from this Court from the party seeking a change in existing law to the party who has a legal right to rely upon and claim the protection of the law as it has been declared.

## IV. Denying MMR the right to bring suit in its home forum, when the only other available forum is so dominated by the defendants as to render them effectively judgment proof there, denies MMR due process.

In *Burger King*, and before that in *McGee*, this Court tried to make clear that due process must be accorded to all parties.

The only other forum in which MMR could bring its claims is San Diego, California, the home base of the defendants. The Copley Press, Inc., is a major interstate media conglomerate and the Union-Tribune is the only metropolitan newspaper in the Southern District of California, reaching over half the households with its newspapers daily. The gross disparity between Copley and MMR in that forum would render the defendants effectively judgment proof, a consideration this Court has repeatedly indicated must be taken into account when jurisdictional questions are decided. *Burger King*, 471

U.S. at 476-478; *McGee*, 355 U.S. at 223-224; *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 18 (1972); *Asahi*, 480 U.S. at 113.

MMI properly raised this issue, (A. 36), but both the district court and the court of appeals ignored it.

## CONCLUSION

For all of the foregoing reasons, this Court should grant certiorari and reverse the decisions below.

Respectfully submitted,

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# APPENDIX

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**UNITED STATES COURT OF APPEALS,
SIXTH CIRCUIT.**

**MARKET/MEDIA RESEARCH, INC.,
Plaintiff-Appellant,**

**v.**

**UNION-TRIBUNE PUBLISHING COMPANY
and COPLEY PRESS, INC.,
Defendants-Appellees.**

Argued Nov. 5, 1991.

Decided Dec. 13, 1991.

Owen C. Neff (argued and briefed), Snyder, Neff & Chamberlin, Cleveland, Ohio, for plaintiff-appellant.

Beth Whitmore (argued and briefed), Arter & Hadden, Cleveland, Ohio, for defendants-appellees.

Before GUY, Circuit Judge, BROWN, Senior Circuit Judge, and CHURCHILL, Senior District Judge.*

BAILEY BROWN, Senior Circuit Judge.

This is a diversity action for breach of contract, fraud, conversion, and related torts. Plaintiff, Market/Media Research, Inc. ("MMR"), appeals from an order of dismissal for lack of *in personam* jurisdiction over Union-Tribune Publishing Co. ("Union") and Copley

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* The Honorable James P. Churchill, Sr. United States District Judge for the Eastern District of Michigan, sitting by designation.

Press, Inc. ("Copley"). MMR also appeals the denial of its motion for reconsideration and leave to file an amended complaint. Because the Ohio district court did not err in its determination that due process requirements preclude the assertion of *in personam* jurisdiction over the Defendants and because the court did not abuse its discretion in denying the post-order motion, we AFFIRM.

## I.

Plaintiff, MMR, an Ohio corporation located in Cleveland, is a marketing and management consulting firm that performs market research for retailers and newspapers. Defendants, Copley and Union, are, respectively, an Illinois corporation and one of its unincorporated operating divisions. The principal place of business of Copley, an interstate publishing conglomerate, is in La Jolla, California. Union publishes two daily newspapers in San Diego, California.

MMR's marketing services consist of surveying local households, performing a market analysis, and, based on its findings, generating a report that informs retailers of effective marketing and advertising strategies. After discussions with Robert Rhodes, president and sole shareholder of MMR, the Newspaper Advertising Bureau ("NAB") agreed to collaborate with MMR to promote a series of demonstration projects for major retailers. The projects were to be funded by local newspaper publishers. MMR and NAB selected the J.D. Penney Company ("Penney") as the retailer for whom to develop the first project, and Penney's Western Regional Marketing Director, Larry Walker, selected San Diego, California, as the site.

Walker discussed the project with Gerry Wilson, the marketing director for Union. Rhodes then telephoned Wilson to explain the details. Approximately one year after this initial contact, and at Rhodes' request, Wilson sent to Rhodes in Ohio reports of Union's current demographic research, and Rhodes sent Wilson a ten-page proposal and a detailed description of the Penney demonstration project.

The parties exchanged a series of telephone calls and correspondence, and Union expressed some interest in financing the project. Subsequently, MMR drafted a services agreement, but neither Copley nor Union ever executed it. MMR maintains, however, that Union orally promised to pay for a research study of San Diego County if Penney accepted the proposal and the newspapers deemed the project to be potentially profitable. MMR points to twenty-two contacts between MMR and Defendants, nine of which Union or Copley executives initiated. All contacts between the Defendants and MMR, however, were by telephone or mail, and the parties agree that Union and Copley do not generally engage in activities in Ohio.

MMR alleges that it obtained from Penney an initial commitment for $300,000.00 in additional advertising with Union. Thereafter, alleges MMR, it began to perform the services as set out in the services agreement. When MMR billed Union, Union disavowed any obligation to pay for MMR's services.

Asserting that under Ohio's long-arm statute the court had personal jurisdiction over Copley and Union, MMR filed suit in the United States District Court for the Northern District of Ohio. Among other grounds for suit, MMR alleged breach of contract, fraud, conversion, unjust enrichment, and damage to MMR's business relationship with Penney. Pursuant to Federal Rule of Civil Procedure 12(b)(2), Copley and Union moved for dismissal for lack of personal jurisdiction. In the alternative, they moved to transfer the case to the Southern District of California.

Without holding an evidentiary hearing, the court determined that, on the undisputed record, the due process standards for the exercise of personal jurisdiction had not been satisfied.[1] It, therefore, granted the 12(b)(2) motion and overruled the motion for change of venue. The court reaffirmed its ruling by denying MMR's motion for reconsideration and for leave to file an amended complaint.

---

[1] The Court also held that Copley's and Union's contacts with Ohio were insufficient to satisfy Ohio Rev. Code Ann. 2307.382 (A), the Ohio long-arm statute.

The issues presented on appeal are (1) whether, because of improper weighing of the written submissions before it, the district court erred in granting the 12(b)(2) motion; (2) whether the nature of the case required the court to hold an evidentiary hearing before ruling on the motion; and (3) whether the court abused its discretion by denying the motion for reconsideration and leave to file an amended complaint.

## II.

### A

As we explained in *Serras v. First Tennessee Bank National Association*, 875 F.2d 1212, 1216 (6th Cir. 1989), the reach of the *in personam* jurisdiction of a district court is limited by the requirements of the Due Process Clause of the Fourteenth Amendment. In the instant case, the district court determined that it was without jurisdiction under the Ohio long-arm statute and, further, that Copley's and Union's contacts with Ohio were not such as would support jurisdiction under the Due Process Clause. Because we agree with the district court that assertion of jurisdiction in this case would not be consistent with due process, and because such a defect defeats jurisdiction regardless of the extent of Ohio long-arm jurisdiction, we confine our analysis to an examination of the district court's assessment that haling Copley and Union into an Ohio court would violate the concept of "'fair play and substantial justice.'" *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463, 61 S.Ct. 339, 342-43, 85 L.Ed. 278 (1940)).

[1,2] As the party seeking the court's assertion of *in personam* jurisdiction, MMR bears the burden of showing that jurisdiction exists. *Theunissen v. Matthews*, 935 F.2d 1454, 1458 (6th Cir. 1991). MMR's burden is lessened, however, because the district court ruled on the Defendants' 12(b)(2) motion without calling for depositions or holding an evidentiary hearing. In such a case, to defeat a motion to dismiss, a party need make only a prima facie showing of jurisdiction. *Id.* Moreover, the court is required to "'consider the pleadings and affidavits in the light most favorable to the plaintiff.'" *American Greetings Corp. v. Cohn*, 839 F.2d 1164, 1169 (6th Cir. 1988)

(quoting *Welsh v. Gibbs*, 631 F.2d 436, 439 (6th Cir. 1980), *cert. denied*, 450 U.S. 981, 101 S.Ct. 1517, 67 L.Ed.2d 816 (1981)).

B

[3] MMR does not contend that the Ohio district court has general *in personam* jurisdiction over Copley and Union. Rather, it submits that Copley's and Union's activities directed to the state of Ohio place the Defendants, only with respect to these claims, properly within the *in personam* jurisdiction of the court. *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n. 8, 104 S.Ct. 1868, 1872 n. 8, 89 L.Ed.2d 404 (1984). Therefore, as we have noted in a number of cases, the threshold issue is whether, in their dealings with MMR, the Defendants "purposefully availed" themselves of "the privilege of acting in the forum state or causing consequence in the forum state." *Theunissen*, 935 F.2d at 1460; *LAK, Inc. v. Deer Creek Enters.*, 885 F.2d 1293, 1299 (6th Cir. 1989), *cert. denied*, --U.S.--, 110 S.Ct. 1525, 108 L.Ed.2d 764 (1990); *American Greetings*, 839 F.2d at 1169; *Southern Machine Co. v. Mohasco Indus.*, 401 F.2d 374, 381-82 (6th Cir. 1968).

MMR contends that when the district court determined the issue of purposeful availment by Copley and Union, it disregarded MMR's pleadings and supporting affidavit and adopted a contradictory version of the jurisdictional facts as offered by Copley and Union. Copley and Union counter that, instead of making a prima facie showing of *facts* sufficient to establish purposeful availment, MMR's pleadings and affidavit state mere speculative inferences and erroneous conclusions of law. Comparing their 12(b)(2) motion to a motion for summary judgment, Copley and Union assert that the court, as it should have, weighed the evidence presented in the opposing documents.

[4] As stated in *Theunissen*, although a motion for summary judgment and a Rule 12(b)(2) motion are similar in some respects, "[i]n sharp contrast to summary judgment procedure, ... the court disposing of a 12(b)(2) motion does not weigh the controverting assertions of the party seeking dismissal." 935 F.2d at 1459 (citing *Serras*, 875 F.2d at 1214). Dismissal is warranted only if all of the facts the plaintiff asserts "collectively [fail] to state a prima facie case for

jurisdiction ... ." *Id.* Therefore, we must determine whether, basing its decision solely on the pleadings and affidavits and ignoring contrary assertions by Copley and Union, the district court in the instant case properly granted Copley and Union's 12(b)(2) motion. *Serras*, 875 F.2d at 1215.

Even if we take MMR's allegations as true, a review of the record reveals that Copley's and Union's contacts with Ohio are insufficient to satisfy "'the *sine qua non* of *in personal* jurisdiction.'" *Southern Machine*, 401 F.2d at 381-2. That is, MMR fails to make claims sufficient to show Copley's or Union's purposeful availment of the privilege of acting in or causing consequences in Ohio.

MMR made the initial contact. Defendants were never present in Ohio to conduct business with MMR, and Defendants never intended to execute a contract in Ohio. Furthermore, MMR's complaint and Rhodes' affidavit reveal the tentativeness of Defendants' commitment to MMR's plan and the hesitation on the part of Union and Copley to enter an agreement. The only allegation of MMR that remotely suggests that Defendants wished to avail themselves of the benefit of MMR's services is stated in averment 11 of Rhodes' affidavit: "Mr. Wilson told me to proceed with development of the proposal for J.C. Penney and to include as options any other services I though [sic] might be beneficial to the UNION-TRIBUNE." Even here, however, the expressions MMR attributes to Union are couched in terms that indicate the speculative nature of the parties' dealings. Moreover, although Copley and Union, in fact, expressed some interest in financing MMR's demonstration project, economic feasibility for the newspapers and Penney's participation were conditions of the proposed agreement. Even though Defendants made telephone calls and sent mail to MMR in Ohio, the quality and nature of their contacts with Ohio fall short of the requirements of due process.

Contrary to MMR's assertions, there is no indication that, in drawing its conclusion, the district court "adopted" Copley and Union's version of the facts. MMR admits that it entered into an agreement with an advertising bureau, which contacted a large retailer, which, in turn, contacted Defendants for the purpose of securing their financial assistance. Defendants did not seek MMR's business, nor did they actively pursue an ongoing business relationship with MMR.

It is clear that neither Copley's nor Union's activities rise to the level of "purposeful availment." MMR, therefore, has failed to carry the minimal burden of establishing a prima facie case of jurisdiction. Accordingly, we hold that the district court properly considered the written submissions and did not err in its determination that exertion of personal jurisdiction in this case would violate due process.

III

[5] Borrowing language from our opinion in *Serras*, MMR submits that when "disputed jurisdiction facts are intimately intertwined with the parties' dispute on the merits," 875 F.2d at 1215, the district court must defer until trial a ruling on a 12(b)(2) motion to dismiss. MMR contends that the jurisdictional facts in the instant case are not merely "intimately intertwined" but are identical, and, therefore, the district court erred by failing to reserve until after trial its determination of the 12(b)(2) motion.

MMR misreads the *Serras* opinion. Although in that case we held that the district court erred by granting a 12(b)(2) motion without obtaining additional evidence before or during trial, we based our decision on the finding that Serras' affidavit offered a "fully adequate allegation of jurisdictional facts." *Id.* MMR overlooks the fact that we noted in *Serras*, a case involving a Michigan district court's assertion of *in personam* jurisdiction, that "the plaintiffs rely not only on alleged telephone calls but also on an allegation that the defendant actually travelled to Michigan to solicit their business, and actually made fraudulent representations while in Michigan." *Id.* at 1217. These allegations alone were sufficient to support jurisdiction; therefore, a 12(b)(2) dismissal was improper absent controverting evidence that may have been presented later in the proceedings. *Serras* should not be read to require the district court to hold an evidentiary hearing when, as in the instant case, a plaintiff's pleadings and affidavits are insufficient to make a prima facie showing of facts supporting the court's assertion of *in personam* jurisdiction.

As we have repeatedly stated, most recently in *Theunissen:*

> Presented with a properly supported 12(b)(2) motion and opposition, the court has three procedural alternatives: it may decide the motion upon the affidavits alone; it may permit discovery in aid of deciding the motion; or it may conduct an evidentiary hearing to resolve any apparent factual questions. The court has discretion to select the method it will follow, and will only be reversed for abuse of that discretion.

935 F.2d at 1458 (citing *Michigan Nat'l Bank v. Quality Dinette, Inc.*, 888 F.2d 462, 466 (6th Cir. 1989); *Serras*, 875 F.2d at 1214). Nothing in the record indicates that the district court abused its discretion by failing to require depositions or to hold an evidentiary hearing prior to its grant of the motion to dismiss.

IV

MMR's final contention is that the district court erred by failing to grant MMR's motion for reconsideration and leave to file an amended complaint. The granting of such a motion is within the discretion of the district court. *Marks v. Shell Oil Co.*, 830 F.2d 68, 69 (6th Cir. 1987); *Bank of Montreal v. Olafasson*, 648 F.2d 1078, 1079 (6th Cir.), *cert. denied*, 454 U.S. 1084, 102 S.Ct. 641, 70 L.Ed.2d 619 (1981). It is our considered opinion, particularly in light of the above discussion, that the court did not abuse its discretion.

V

For the foregoing reasons, we AFFIRM the district court's order dismissing the case for lack of *in personam* jurisdiction over Copley and Union, and we AFFIRM the denial of the motion for reconsideration and leave to file an amended complaint.

No. 91-3371

UNITED STATES COURT OF APPEALS,
FOR THE SIXTH CIRCUIT

MARKET/MEDIA RESEARCH, INC.,
Plaintiff-Appellant,

v.

UNION-TRIBUNE PUBLISHING COMPANY;
THE COPLEY PRESS, INC.,
Defendants-Appellees.

ORDER
(Filed Feb 11 1992)

BEFORE:GUY, Circuit Judge; BROWN, Senior Circuit Judge; and CHURCHILL,* Senior United States District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT
/s/ Leonard Green
Leonard Green, Clerk

---

* Hon. James P. Churchill sitting by designation from the Eastern District of Michigan.

**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF OHIO**
**EASTERN DIVISION**

**JUDGE ALVIN I. KRENZLER**
**CASE NO. 1:90CV1586**

**MARKET/MEDIA RESEARCH, INC.**
**Plaintiff**

**-vs-**

**UNION-TRIBUNE PUBLISHING CO.**
**THE COPLEY PRESS, INC.**
**Defendants**

**MEMORANDUM OF OPINION AND ORDER GRANTING DEFENDANTS' MOTION TO DISMISS & OVERRULING DEFENDANTS' MOTION TO TRANSFER VENUE**

The plaintiff filed this diversity action against the defendants and its principal allegations are that the plaintiff is an Ohio corporation engaged in the business of providing research, marketing and management consulting services to clients. The defendants are California corporations, neither of which has its principal place of business in Ohio.

The plaintiff alleges that the defendant Union-Tribune Publishing Co. (Union-Tribune) promised to pay the plaintiff for a research study of San Diego County provided that the plaintiff submit a proposal for the study acceptable to the J. C. Penney Company (Penney) and profitable to the newspapers.

Plaintiff alleges that on May 24, 1988, it submitted to the defendant Union-Tribune a proposal that met these requirements. The plaintiff further alleges that by its conduct the defendant accepted the terms of plaintiff's services agreement which was sent to the Union-Tribune along with a research proposal, on May 24, 1988. The agreement was executed in Cleveland, Ohio.

It is further alleged that on or about September 6, 1988, the defendant Union-Tribune first indicated its intention to breach the agreement with the plaintiff and that the actual breach occurred on October 3, 1988. Further, the plaintiff alleges in its other claims for relief that the defendants acted in bad faith and knowingly delayed the implementation of Penney's demonstration project.

Other counts alleged are unjust enrichment and wrongful conduct of the defendants in damaging the plaintiff's business relationship with Penney.

The parties conducted substantial discovery and the defendants filed a motion to dismiss for lack of personal jurisdiction or, in the alternative, to transfer the case to the Southern District of California. The plaintiff and defendants filed briefs and attached evidentiary material in support of their arguments. The Court scheduled the matter for oral argument on the defendants' motions.

The relevant jurisdictional facts are that the defendant Union-Tribune is an operating division of the Copley Press, Inc. (Copley Press), and publishes two daily newspapers in San Diego, California. Defendant Copley Press is an Illinois corporation with its principal place of business in La Jolla, California.

The defendants are not currently, and never have been, licensed to do business in the State of Ohio and have no office or place of business located in the State of Ohio. Further, none of the defendants' employees, agents, directors, or officers have maintained offices or residences within the State of Ohio. Defendants have never maintained any telephones, books, records, bank accounts or owned any real or personal property within the State of Ohio. Defendants do not regularly do or solicit business or have they, in the past, regularly done or solicited business in the State of Ohio and none of their

employees, agents, representatives, or officers have ever been present in or sent to Ohio for the purpose of engaging in regular or substantial business. The defendants do not actively solicit or promote distribution of their newspapers in Ohio.

On or about October 6, 1987, the plaintiff through its president, Robert Rhodes, contacted Larry E. Walker of Penney in San Diego, California, first by telephone and then in person. Rhodes placed telephone calls to Walker of Penney and Wilson of the Union-Tribune concerning his proposed research study to be undertaken in San Diego County, California. The goal of the study was to show Penney and the Copley Press that certain changes in advertising to be recommended by the plaintiff as a result of the proposed study would increase Penney's retail sales and the newspaper's advertising revenues.

Rhodes made several calls to Wilson to inquire about the proposal. Rhodes sent a written proposal to Wilson in California. This written proposal was never executed nor accepted by the defendants. Subsequently, Rhodes advised the defendants that Penney would not pay for the proposed study and Rhodes proposed that defendants pay for the study out of revenues to be received from Penney.

The services which the plaintiff proposed were to be performed in San Diego, California, and were intended to improve the profitability of Penney stores in San Diego. The plaintiff contends that the proposed service agreement was executed in Cleveland, Ohio, as alleged in the complaint. However, the proposed service agreement was never executed by the parties.

Subsequently, when the defendants did not sign the agreement, the plaintiff billed the defendants in the amount of $71,750.00 for services which it alleges were performed pursuant to the services agreement. The defendants responded by denying any contract and refuting any obligation to pay for the plaintiff's services.

It is undisputed that Robert Rhodes was at all times the sole officer, director and shareholder of the plaintiff, which is a corporation which has its principal and only place of business in Cuyahoga County, Ohio. The plaintiff is in the business of providing research, marketing and management services to media clients.

LAW

A federal court sitting in diversity must look to the law of the forum state to determine whether there is personal jurisdiction over foreign defendants. *Erie Railroad v. Tompkins*, 34 U.S. 64 (1958). When there is a challenge to personal jurisdiction the plaintiff has the burden of showing personal jurisdiction. The party challenging personal jurisdiction must show that there is personal jurisdiction under Ohio's long-arm statute and that the application of the long-arm statute does not offend constitutional principles of due process. *Inflight Device Services Corp. v. Van Dusen Air, Inc.*, 466 F.2d 220 (6th Cir. 1972).

Ohio's long-arm statute, Ohio Rev. Code Ann. § 2307.382(A) applies as to personal jurisdiction under the following circumstances:

> (A) A court may exercise personal jurisdiction over a person who acted directly or by any agent, as to a cause of action arising from the person's:
>
> (1) Transacting any business in this state;
>
> (2) Contracting to supply services or goods in this state;
>
> (3) Causing tortious injury by an act or omission in this state;
>
> (4) Causing tortious injury in this state by an act or omission outside this state if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state;
>
> (5) Causing injury in this state to any person by breach of warranty expressly or impliedly made in the sale of goods outside this state when he might reasonably have expected such person to use, consume, or be affected by the goods in this state, provided that he also regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state;

(6) Causing tortious injury in this state to any person by an act outside this state committed with the purpose of injuring persons, when he might reasonably have expected that some person would be injured thereby in this state;

(7) Causing tortious injury to any person by a criminal act, any element of which takes place in this state, which he commits or in the commission of which he is guilty of complicity.

(8) Having an interest in using, or possessing real property in this state;

(9) Contracting to insure any person, property, or risk located within this state at the time of contracting.

The present case is distinguished from *Burger King Corp. v. Rudzewicz*, 471 U. S. 462 (1985), and *Kentucky Oaks Mall v. Mitchells*, 53 Ohio St. 3d 73 (1990), in that in those cases there were written agreements as well as ongoing and continuous relationships between the parties that provided required nexus to the forum state. In the present case, the facts are exactly the opposite. The defendants do not regularly or purposely solicit business in the State of Ohio nor engage in a substantial amount of business in Ohio.

In order to determine personal jurisdiction, it is necessary to look at all of the facts and circumstances. In order to have personal jurisdiction, it is necessary that both the Ohio long-arm statute as well as the due process provisions of the Fourteenth Amendment of the United States Constitution must also be satisfied. In other words, the maintenance of the suit must not offend traditional notions of fair play and substantial justice.

The current law in the Sixth Circuit is that in order to exercise personal jurisdiction a defendant must purposely avail himself of the privilege of acting in the forum state or causing a consequence in the forum state. The cause of action must arise from the defendant's activities there. The acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable. Further, in order to have personal jurisdiction,

the nature and the activities conducted by defendants in a state must be sufficient to constitute due process minimum contacts.

The plaintiff contends that the fact that it prepared a proposed contract in the State of Ohio and transmitted this contract to the defendants in California and, further, that the plaintiff made telephone calls from Ohio to California to the defendants is sufficient to attach personal jurisdiction to the defendants in Ohio.

If this Court were to hold that these very minimum acts done by the plaintiff, all unilateral and one-sided, would make personal jurisdiction, the practical effect would be that there would be "national jurisdiction" in every case and this is not yet the state of the law.

The defendants did not have sufficient minimum contacts in the State of Ohio to attach personal jurisdiction under the long-arm statute nor did they cause a consequence in this district. To hold that personal jurisdiction did attach to the defendants in the State of Ohio would be a violation of the due process clause of the Fourteenth Amendment to the United States Constitution.

This Court holds that there was not personal jurisdiction to attach jurisdiction to this Court. Therefore, defendants' motion to dismiss for lack of personal jurisdiction is granted. Because this court finds that there was no personal jurisdiction, the defendants' motion to change venue is overruled.

/s/ Alvin I. Krenzler
UNITED STATES DISTRICT JUDGE

Owen Neff
Beth Whitmore

**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF OHIO**
**EASTERN DIVISION**

**JUDGE ALVIN I. KRENZLER**
**CASE NO. 1:90CV1586**

**MARKET/MEDIA RESEARCH, INC.**
**Plaintiff**

**-vs-**

**UNION-TRIBUNE PUBLISHING CO.**
**THE COPLEY PRESS, INC.**
**Defendants**

**ORDER OF DISMISSAL**

This Court, having separately filed its Memorandum of Opinion and Order Granting Defendants' Motion to Dismiss & Overruling Defendants' Motion to Transfer Venue, hereby dismisses the plaintiff's case, without prejudice. Costs to be taxed to the plaintiff.

/s/ Alvin I. Krenzler
UNITED STATES DISTRICT JUDGE

Owen Neff
Beth Whitmore

**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF OHIO**
**EASTERN DIVISION**

**JUDGE ALVIN I. KRENZLER**
**CASE NO. 1:90CV1586**

**MARKET/MEDIA RESEARCH, INC.**
**Plaintiff**

**-vs-**

**UNION-TRIBUNE PUBLISHING CO.**
**THE COPLEY PRESS, INC.**
**Defendants**

**MARGINAL ENTRY ORDER**

Motion for reconsideration overruled. Motion for leave to file an amended complaint overruled.

/s/ Judge Alvin I. Krenzler
4-8-91

**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF OHIO**
**EASTERN DIVISION**

**CASE NO. 1:90CV1586**
**JUDGE KRENZLER**

MARKET/MEDIA RESEARCH, INC.
Suite 201
4779 Columbia Road
North Olmsted, Ohio 44070

Plaintiff,

-vs-

UNION-TRIBUNE PUBLISHING CO.
350 Camino De La Reina
P.O. Box 191
San Diego, CA 92112-4106

and

THE COPLEY PRESS, INC.
7776 Ivanhoe Avenue
P.O. Box 1530
La Jolla, CA 92038-1530

Defendants.

AMENDED COMPLAINT
(Jury Demand)

The Plaintiff, leave of Court having first been obtained and in accordance with Civil Rule 15(a), files this its Amended Complaint.

## JURISDICTION

1. Jurisdiction in this Court is founded on diversity of citizenship and an amount in controversy exceeding $50,000.00 exclusive of interest and costs, as set forth in Title 28 USC Section 1332.

## PARTIES

2. Plaintiff is an Ohio corporation engaged in the business of providing research, marketing and management consulting services to clients.

3. Defendants are believed to be California corporations. UNION-TRIBUNE PUBLISHING CO. is a wholly-owned subsidiary of the COPLEY PRESS, INC. and publishes newspapers in San Diego County, California, neither of which has its principal place of business in Ohio. Diversity is complete.

## FIRST CLAIM FOR RELIEF

4. Paragraphs 1-3 are incorporated by reference.

5. On April 15, 1988, Defendant UNION-TRIBUNE promised to pay Plaintiff for a research study of San Diego County provided Plaintiff submitted a proposal for the study acceptable to the J.C. Penney Co. and profitable to the newspapers.

6. On May 24, 2988, Plaintiff submitted to Defendant UNION-TRIBUNE a proposal that met those requirements.

7. By their conduct, Defendants accepted the terms of Plaintiff's Services Agreement (Exhibit "A") which was sent to UNION-TRIBUNE along with the research proposal on May 24, 1988. By its terms the Agreement was executed in Cleveland, Ohio.

8. On or about September 6, 1988, the Defendant UNION-TRIBUNE, first indicated its intention to breach the agreement with the Plaintiff. Actual breach occurred on October 3, 1988.

## SECOND CLAIM FOR RELIEF

9. Paragraphs 1-8 are incorporated by reference.

10. The Defendants, in bad faith first knowingly delayed the implementation of the J. C. Penney demonstration project, thereby preventing Plaintiff's further performance under the contract and destroying the right of the plaintiff to receive the full fruits of the contract, and then denied in bad faith that UNION-TRIBUNE is contractually obligated to Plaintiff.

## THIRD CLAIM FOR RELIEF

11. Paragraphs 1-10 are incorporated by reference.

12. UNION-TRIBUNE falsely and knowingly represented to Plaintiff that it would pay for Plaintiff's services, intending that Plaintiff should rely on its promise.

13. Plaintiff did rely and had a right to rely on UNION-TRIBUNE'S promise and spent several months developing the research study and obtaining from the J.C. Penney Co. a commitment to increase its advertising in Defendants' newspapers, foregoing other work to perform these services for UNION-TRIBUNE.

14. Plaintiff was damaged and suffered financial loss as a result of UNION-TRIBUNE'S fraudulent conduct.

## FOURTH CLAIM FOR RELIEF

15. Paragraphs 1-14 are incorporated by reference.

16. Defendants, as a result of their wrongful conduct, have enriched themselves unjustly, receiving a benefit from the services of Plaintiff for which Plaintiff has not been paid.

## FIFTH CLAIM FOR RELIEF

17. Paragraphs 1-16 are incorporated by reference.

18. The wrongful conduct of Defendants has damaged Plaintiff's business relationship with the J.C. Penney Co. resulting in a further loss of earnings.

WHEREFORE, Plaintiff demands judgment in favor of Plaintiff and against the Defendants, jointly and severally, as follows:

On its First Claim for Relief, money damages sufficient to compensate Plaintiff for its actual losses.

On its Second Claim for Relief, punitive damages trebling the amount of its compensatory damages.

On its Third Claim for Relief, money damages sufficient to compensate Plaintiff for its loss of earnings and other damages caused by Defendants' fraud and deceit, and punitive damages.

On its Fourth Claim for Relief, the profits UNION-TRIBUNE has earned and will earn on the additional revenues resulting from Plaintiff's efforts on behalf of UNION-TRIBUNE.

On its Fifth Claim for Relief, money damages sufficient to compensate Plaintiff for its loss of earnings resulting from the damage to Plaintiff's business relationship with the J.C. Penney Co. and punitive damages.

Its costs, attorney fees and other expenses in this action, and such other and further relief as to the Court seems just.

Respectfully submitted,
SNYDER, NEFF AND CHAMBERLIN
By /s/ Owen C.Neff
OWEN C. NEFF

Attorney for Plaintiff
Market/Media Research, Inc.

STATE OF OHIO )
) SS
CUYAHOGA COUNTY )

MOTION

The Plaintiff moves for an Order granting a jury trial of the issues herein.

/s/ Owen C. Neff
OWEN C. NEFF

(Service omitted in printing)

**EXHIBIT "A"**

## SERVICES AGREEMENT

This agreement, made at Cleveland, Ohio, as of this ___ day of _____, 19__, by and between MARKET/MEDIA RESEARCH, INC., an Ohio corporation, which with its successors and assigns is herein called "Research", and UNION-TRIBUNE PUBLISHING CO., a _____ corporation, which with its successors and assigns is herein called "Client", is to EVIDENCE THAT:

WHEREAS Research has devised and offers for sale a marketing research plan (herein called the "Plan"); and

WHEREAS Client desires to engage Research to provide telephone survey and other data gathering services, analysis, consultation and reporting services, and customized computer services (herein collectively call the "Services") in connection with the implementation of the Plan;

NOW, THEREFORE, in consideration of the foregoing statements and the mutual covenants and promises made in this Agreement and for other valuable consideration (the receipt and sufficiency of which are hereby acknowledged), Research and Client (herein collectively called the "Parties") agree as follows:

1.Agreement Term.

1.1 The term of this Agreement (herein called the "Agreement Term") shall commence on _____, 19__.

1.2 The Agreement Term shall continue until terminated as provided in this Agreement.

2. Engagement of Research. Subject to the terms and conditions of this Agreement, Client hereby engages Research to render the Services designated in Section 3 of this Agreement, and Research hereby agrees to perform, as an independent contractor, the Services in accordance with the terms and conditions of this Agreement.

3. Duties and Responsibilities of Research.

3.1 In return for the Survey fee, Report fee, Traffic Monitoring fee and Computer fee paid hereunder by Client, Research shall provide the Services designated in this Section 3 as an independent contractor.

3.2 Research shall design and conduct telephone survey or other appropriate data gathering services (herein called "Survey Services") which shall include design of the study, relevant field work, data entry, and preliminary tabulation and analysis of the data. The Survey Services shall focus on the study area of San Diego County, California, with a general goal of collecting data on department stores, discount and specialty apparel stores and shopping centers in order to develop a demonstration project for JCPenney Co. in San Diego County. The telephone survey services for Client shall be based upon a simple random sample of 8,200 households with telephones in the survey study area.

3.3 Research shall provide analysis, consultation and reporting services (herein called "Report Services") to Client on a mutually agreeable basis in order to interpret the data generated through the Survey Services. Upon mutual consent of the Parties, Research shall generate reports for shopping centers, store groups, individual stores, merchandise lines, geographical areas or other targeted market segments.

3.4 Research shall provide computer diskettes which contain copies of the completed survey data base (herein called "Computer Services") to Client together with an MS-DOS version of the tabulation software utilized by Research. The Computer Services shall be customized for use by the advertisers of Client and shall include the formulas used to select from the data base the potential and actual customers of the store and its store group, merchandise lines and competitors.

3.5 Research shall design and install electronic equipment to monitor shopper traffic patterns (herein called "Traffic Monitoring Services") in stores to be designated upon mutual consent of the parties.

4. Duties and Responsibilities of Client.

4.1 Survey Fee. In return for only the Survey Services described in Section 3.2 herein, Client shall pay Research a basic fee (herein called the "Survey Fee") in the amount of One-Hundred-Forty-Three-Thousand-Five-Hundred Dollars ($143,500.00).

4.2 Installments of Survey Fee. Client shall pay the Survey fee in three (3) installments which shall become due and payable as follows: 50% upon completion of the designed study; 25% upon the completion of the field work; and 25% upon completion of preliminary tabulation and analysis. Research reserves the sole

discretion to determine the date each work segment has been completed.

4.3 Report Fee. In return for only the Report Services described in Sections 3.3 herein, Client shall pay Research an analysis, consultation and report fee (herein called the "Report Fee") in the amount of Fifty dollars ($50.00) per hour for each and every hour Research expends in completing the Report Services.

4.4 Installments of Report Fee. Client shall pay the Report Fee within thirty (30) days after Research bills client for the Services rendered during each monthly period.

4.5 Computer Fee. In return for only the Computer Services described in Section 3.4 herein, Client shall pay Research a computer fee (herein called the "Computer Fee") in the amount of Eight Hundred Dollars ($800.00) per copy for each complete computer study ordered by Client. Client shall pay the Computer Fee upon receipt of each complete computer study.

4.6 Traffic Monitoring Fee. In return for only the Traffic Monitoring Services described in Section 3.5 herein, Client shall pay Research a fee equal to the monthly lease payments, based on a 36-month lease with a 10 per cent residual value, of the equipment used in performing the Traffic Monitoring Services.

4.7 Travel Expenses. Client shall pay Research the reasonable travel expenses of Research personnel for any travel on behalf of Client requested or authorized by Client during any monthly period. Client shall pay the travel expenses within thirty (30) days after Research bills Client for the expenses.

5. Termination.

5.1 This Agreement and the Agreement Term shall continue until the Services designated in Section 3 herein have been fully performed, except as otherwise provided herein.

5.2 Notwithstanding any contrary provision herein, either Party may terminate this Agreement and the Agreement Term if the other Party breaches this Agreement; provided, however, that the terminating Party shall give the breaching Party written notice of such breach and sixty (60) days thereafter to correct the breach before terminating this Agreement.

6. Miscellaneous.

6.1 This Agreement constitutes the entire agreement between Research and Client regarding the subject matter hereof and all prior written or oral negotiations, representations, arrange-

ments and/or agreements regarding the subject matter herein are merged into and superseded by this Agreement. Research and Client acknowledge that there are no oral or written understandings, arrangements and/or agreements between the Parties relating to the subject matter of this Agreement.

6.2 All provisions of this Agreement are severable and no provision hereof shall be affected by the invalidity of any other such provision.

6.3 No action by Research and no refusal or neglect by Research to exercise any right hereunder or to enforce compliance with the terms of this agreement shall constitute a waiver of any provisions herein with respect to any violations, actions or omissions hereunder, unless such waiver is expressed in writing by Research.

6.4 This Agreement may be amended, altered or changed only by a written document signed by Research and Client.

6.5 For purposes of this Agreement, the singular includes the plural and vice-versa and the feminine, masculine and neuter include each other.

IN WITNESS WHEREOF, the Parties hereto have set their hands as of the day and year first written above.

In the Presence of: MARKET/MEDIA RESEARCH, INC.

_____ By:_____

(Signature of First Witness) Robert E. L. Rhodes, President

_____

(Signature of Second Witness) "Research"

UNION-TRIBUNE PUBLISHING CO.

_____ By:_____

(Signature of First Witness) (Name and Title)

_____

(Signature of Second Witness) "Client"

**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF OHIO**
**EASTERN DIVISION**

**JUDGE ALVIN I. KRENZLER**
**CASE NO. 1:90CV1586**

MARKET/MEDIA RESEARCH, INC.
Plaintiff

-vs-

UNION-TRIBUNE PUBLISHING CO.
THE COPLEY PRESS, INC.
Defendants

AFFIDAVIT OF ROBERT E. L. RHODES, III

STATE OF OHIO )
) SS AFFIDAVIT
CUYAHOGA COUNTY )

ROBERT E.L.RHODES, III, being first duly sworn according to law, deposes and states that he has personal knowledge of the following facts:

1. I am, and was at all times relevant to the matters stated herein, the sole officer, director and shareholder of Plaintiff, MARKET/MEDIA RESEARCH, INC.

2. MARKET/MEDIA is an Ohio corporation and has its principal and only place of business in Cuyahoga County, Ohio.

3. Since its incorporation in 1980, MARKET/MEDIA has been in the business of providing research, marketing and management services to media clients.

4. As a result of basic research done in markets in Northeastern Ohio, MARKET/MEDIA developed a new technology for measuring the effects of media advertising on the behavior of retail shoppers and for optimizing the sales and earnings of specific retailers in their geographical markets. For example, in 1988, a typical J.C. PENNEY department store had net sales of some $10 million on which it earned 6.3% or $630 thousand. When sales of an existing store are increased, slightly more than 30 cents of each incremental sales dollar carries down to the bottom line. Increasing sales of a store by 20 per cent would roughly double its operating earnings.

5. In the Spring of 1987, I discussed these results with the Newspaper Advertising Bureau and we agreed to set up a series of demonstration projects with major retailers and newspapers. The object was to enable newspapers to increase their advertising revenues by providing research services to their retail advertisers that would in turn enable the retailers to optimize their sales and earnings in the markets served by the newspapers.

6. After several months of discussion, we selected J.C. PENNEY as the retailer with whom to develop the first project. The Ad Bureau introduced me to Larry D. Walker, Western Region Advertising Manager for J.C. PENNEY and I met with MR. WALKER in October, 1987, to discuss a demonstration project. Mr. Walker was to select a suitable market for the project.

7. In March, 1988, I learned from Mr. Walker that he had selected San Diego County, California, as the location for the demonstration project and that he had met with Gerry Wilson, director of marketing for the San Diego UNION-TRIBUNE, about it.

8. As a result of my conversation with Mr. Walker, I telephoned Mr. Wilson on March 25, 1988. Mr. Wilson confirmed his discussion with Mr. Walker and asked how the project would work. I explained our basic research in Ohio, the role of the Ad Bureau, my meeting with Mr. Walker and J.C. PENNEY'S selection of San Diego as the first demonstration project. I explained that the newspapers would pay the research costs for the demonstration project and would receive increased advertising revenue in return. The same data base could also be used to generate descriptive statistics for printed reports and to design similar projects with other non-competing retailers.

9. Mr. Wilson said the UNION-TRIBUNE was interested in participating in the J.C. PENNEY project and asked how we should proceed. I asked Mr. Wilson to send me copies of the UNION-TRIBUNE'S current research reports and agreed to send Mr. Wilson additional information on MARKET/MEDIA'S research and services.

10. As a result of that conversation, I sent Mr. Wilson a copy of THE EFFECTIVE RETAIL MARKET: Advertising, Shopping Behavior and the Bottom Line and Mr. Wilson sent me a number of UNION-TRIBUNE publications with a covering letter dated March 30, 1988. (Exhibit 1)

11. On April 15, 1988, I spoke to Mr. Wilson again and suggested a meeting with him and anyone else at the newspapers who needed to be involved in the project planning. Mr. Wilson replied that such a meeting would be unnecessary because if: 1) J.C. PENNEY wanted to do the project and 2) such a project made economic sense for the newspapers, the UNION-TRIBUNE would do the project. Mr. Wilson told me to proceed with development of the proposal for J.C. PENNEY and to include as options any other services I thought might be beneficial to the UNION-TRIBUNE.

12. In reliance on Mr. Wilson's representations, I informed Mr. Walker of the substance of my conversation with Mr. Wilson and the terms under which the UNION-TRIBUNE had offered to do the project. I asked Mr. Walker what assurances J.C. PENNEY would be willing to give the UNION-TRIBUNE that the project would result in increased advertising revenues. As a result of this conversation it was agreed that $300,000.00 then being spent on a local preprint program in San Diego County could be shifted to the UNION-TRIBUNE to pay for the costs of the research project. Since the $300,000.00 was sufficient to satisfy the condition of the UNION-TRIBUNE'S offer, I began preparation of the project proposal for the San Diego Market.

13. On May 12, 1988, I forwarded to Mr. Walker at J.C. PENNEY a copy of the project proposal and a draft of a cover letter to Mr. Wilson at the UNION-TRIBUNE explaining the shift of $300,000.00 in J.C. PENNEY advertising from the local preprint program in San Diego to the UNION-TRIBUNE. The $300,000.00 was to be new revenue to the UNION-TRIBUNE from which it would pay the research costs of the demonstration project.

14. Mr. Walker and I discussed the project proposal and cover letter in telephone conversations following his receipt of the drafts. I incorporated a section on store image at Mr. Walker's suggestion and made minor changes in the wording of the cover letter to make clear that the $300,000.00 in new revenue to be shifted from the local preprint program was intended by J.C. PENNEY to pay for the research portion of the demonstration project and that the ultimate advertising budget for the demonstration project would depend on the results of the research.

15. On May 24, 1988, I reviewed the final version of the project proposal and cover letter with Mr. Walker. Mr. Walker approved both the letter and the project proposal, and I then forwarded them to Mr. Wilson by UPS Overnight Air Letter (See Exhibit 2).

16. All of the work by MARKET/MEDIA which constituted acceptance of the UNION-TRIBUNE'S unilateral offer of April 15, 1988, was performed in Ohio.

17. Enclosed with the May 24, 1988, letter to Mr. Wilson (Exhibit 3) and the J.C. PENNEY demonstration project proposal (Exhibit 4) was a copy of MARKET/MEDIA'S SERVICES AGREEMENT (Exhibit 5). The Services Agreement was intended to reduce to writing details of the J.C. PENNEY project covered by the April 15, 1988, oral agreement and to set out the terms under which the optional services to be provided by MARKET/MEDIA on request for other UNION-TRIBUNE advertisers would be billed and paid. The "Survey Services" described in paragraph 3.2 thereof were to be subcontracted to a national field service which would have made the actual calls from a telephone room located in Arizona and supplied clean raw data from the interviews to MARKET/MEDIA on computer diskettes. MARKET/MEDIA would then have performed all of the data analysis and reporting services in its office in Ohio. The same pattern would have been followed in all subsequent J.C. PENNEY projects and similar projects with other retailers and other newspapers in other markets across the country.

18. "Report Services" described in paragraph 3.3 of the Services Agreement would have been performed in Ohio except to the extent travel to California was required to discuss results with UNION-TRIBUNE and COPLEY PRESS personnel and to present reports to UNION-TRIBUNE advertisers as requested by the client.

19. The "Computer Services" described in paragraph 3.4 of the Services Agreement would have been performed in Ohio.

20. The "Traffic Monitoring Services" described in paragraph 3.5 of the Services Agreement would have been performed partially in Ohio and partially in California. The data would have been collected by computer-controlled devices installed at sites in California. MARKET/MEDIA would have retrieved the data by telephone and analyzed the results and prepared reports in Ohio.

21. By the terms of the Services Agreement, the agreement was deemed "made at Cleveland, Ohio" (Exhibit 1, first sentence).

22. The invoice for the first installment of MARKET/MEDIA'S fees was sent to the UNION-TRIBUNE from MARKET/MEDIA'S Ohio office. (Exhibit 6). All such payments were to be billed from and made to MARKET/MEDIA'S Ohio office.

23. It was contemplated by MARKET/MEDIA and J.C. PENNEY that the San Diego project would serve as a model for future optimization projects in other markets. The Defendants were aware of that fact from my first conversation with Mr. Wilson on March 25, 1988.

24. On June 2, 1988, I wrote Mr. Wilson the letter identified as Exhibit 7 asking that the UNION-TRIBUNE review the enclosed list of stores and locations.

25. On June 15, 1988, I spoke to Mr. Wilson by telephone. Mr. Wilson acknowledged receiving the June 2 letter and the lists of stores and locations. Mr. Wilson said he had doubts about the willingness of J.C. PENNEY to commit the additional $300,000.00 in new advertising revenue to the UNION-TRIBUNE and I told him he could confirm the commitment by calling Mr. Walker. Mr. Wilson then reaffirmed the UNION-TRIBUNE'S intention to go forward with the project. He said the corporate marketing and research staff at COPLEY NEWSPAPERS handled all research for the UNION-TRIBUNE and that the corporate staff would be handling the J.C. PENNEY project from that time onward. Mr. Wilson said he understood that MARKET/MEDIA was a consulting firm rather than a field service and that COPLEY NEWSPAPERS might wish to pay MARKET/MEDIA a consulting fee and to contract for the field work directly if that would be satisfactory with MARKET/MEDIA. I told Mr. Wilson that if COPLEY NEWSPAPERS could get the field work done at a lower cost by a competent field service that would be entirely satisfactory. Mr. Wilson said I would receive a telephone call the next week from COPLEY NEWSPAPERS concerning the matter.

26. Subsequently I received the letter dated June 22, 1988, and identified as Exhibit 8 from Nancy B. Coleman. I understood the letter to be a confirmation of my June 15 telephone conversation with Mr. Wilson.

27. My first contact at COPLEY NEWSPAPERS was Thomas Copeland, director of research, who passed the matter on to Stu Neffler, director of marketing for COPLEY.

28. I first spoke to Mr. Neffler on June 30, 1988. I told Mr. Neffler about MARKET/MEDIA'S retail market research, its work with the Newspaper Advertising Bureau to set up demonstration projects, my discussions with Mr. Walker at J.C. PENNEY and his selection of San Diego as PENNEY'S preferred market for the first demonstration project. I told Mr. Neffler of my discussions with Mr. Wilson at the UNION-TRIBUNE and of the UNION-TRIBUNE'S agreement to pay the research costs for the J.C. PENNEY project and Mr. Wilson's statement that the corporate staff would be handling the details of the project from June 14 forward. I discussed with Mr. Neffler the organizational changes taking place at J.C. PENNEY and the urgency of getting the contract signed for the additional $300,000.00 in J.C. PENNEY advertising in the UNION-TRIBUNE and getting the field study underway.

29. In consequence of the conversation with Mr. Neffler on June 30, I received a telephone call on July 7, 1988, from Dan McGuckin, a research analyst for COPLEY NEWSPAPERS. Mr. McGuckin and I reviewed the J.C. PENNEY demonstration project proposal and MARKET/MEDIA'S Services Agreement, section by section. Mr. McGuckin asked numerous questions to clarify the intent of various provisions of the Services Agreement and did not object to any provision thereof or otherwise indicate that the Agreement was not entirely satisfactory to the COPLEY PRESS or the UNION-TRIBUNE. We then discussed details of the research methodology and the specific questions to be asked of the respondents. At Mr. McGuckin's request, I forwarded to him a copy of the completed designed study, a copy of The Effective Retail Market and a copy of my June 2 letter to Mr. Wilson with the store list enclosures by UPS Next Day Air Letter believing the UNION-TRIBUNE and COPLEY PRESS intended to pay for them. The receipt (Exhibit 9) indicates these materials were received on July 8, 1988.

30. I spoke to Mr. McGuckin again on July 13, 1988. Mr. McGuckin acknowledged receiving the materials I sent him the previous week. Mr. McGuckin had no further questions with respect to the matters we had discussed earlier nor with the questionnaire and did not object to any aspect of the designed study or any provision of the J.C. PENNEY demonstration project proposal or MARKET/MEDIA Services Agreement. Mr. McGuckin said he had scheduled a meeting with UNION-TRIBUNE personnel to go over the project and that I would receive a call from the UNION-TRIBUNE following the meeting.

31. Subsequent to my July 13 conversation with Mr. McGuckin I did not receive any telephone call or other communication from the UNION-TRIBUNE or COPLEY PRESS objecting to any provision of the Services Agreement or in any way suggesting that the Services Agreement had not been accepted by the UNION-TRIBUNE and COPLEY PRESS pursuant to the April 15, 1988, oral agreement.

32. In reliance on the silence of the UNION-TRIBUNE and COPLEY PRESS, MARKET/MEDIA deemed its Services Agreement accepted and continued to perform according to its terms.

33. I spoke to Mr. McGuckin again on July 19, 1988, and told him that I had received no calls or other communications from the UNION-TRIBUNE since his meeting with them the following week. Mr. McGuckin replied that evidently there had been some miscommunication and that he would speak to Mr. Neffler about it.

34. On July 21, 1988, I spoke to Mr. Neffler, told him of my conversations with Mr. McGuckin and that I had heard nothing from the UNION-TRIBUNE following Mr. McGuckin's meeting with them the previous week. Mr. Neffler replied that apparently Mr. Wilson did not want to do the project "because business has been soft this year". I reminded him of Mr. Wilson's unilateral offer to pay the research costs for the J.C. PENNEY demonstration project if (1) J.C. PENNEY wanted to do the project and (2) if the project was profitable for the UNION-TRIBUNE. Mr. Neffler said Mr. Wilson did not believe that the shift of J.C. PENNEY'S local preprint dollars to ROP advertising in the UNION-TRIBUNE (a net increase of $300,000.00 annually to the UNION-TRIBUNE) would be profitable except perhaps over a very long period of time. I told Mr. Neffler that MARKET/MEDIA'S services included marketing and management consulting

for newspapers and that I was therefore fully acquainted with the incremental costs of publishing advertising in newspapers and that approximately 70 cents of each additional dollar in net advertising revenues from J.C. PENNEY would be profit to the UNION-TRIBUNE. I then asked Mr. Neffler to clarify the relationship between the UNION-TRIBUNE PUBLISHING CO. and the COPLEY PRESS and the way decisions were made and by whom. Mr. Neffler replied that the newspapers make their own decisions and the corporate staff provides in-house consulting services when requested by the newspapers to do so. Mr. Neffler said I should send Mr. Wilson a letter explaining the financial consequences of the J.C. PENNEY plan since the newspapers lacked sophisticated accounting systems capable of providing incremental cost and revenue analyses and that Mr. Wilson would not have such data readily available. Mr. Neffler said he would telephone Mr. Wilson and tell him the letter was coming. My letter dated August 2, 1988, with enclosure (Exhibit 10) contains the explanation requested and a worksheet illustrating how incremental costs and profits are calculated and providing a column for the UNION-TRIBUNE to enter its own cost data. Mr. Neffler said Mr. wilson would probably not be able to get in touch with J.C. PENNEY about the increase in advertising immediately because Mr. Wilson was tied up in labor negotiations through the first week in August.

35. I have examined the documents provided by the Defendants in response to MARKET/MEDIA'S FIRST DISCOVERY requests and found among them a copy of my memorandum to Mr. Wilson explaining the incremental cost analysis with notes made by someone at the UNION-TRIBUNE. On page 2, the notes indicate that the incremental production costs for a page of ROP advertising at the UNION-TRIBUNE is $1,250.00 compared to my illustration figure of $1,512.90, indicating that the incremental profit to the UNION-TRIBUNE would actually be greater than the estimate I had made using market rates for newsprint. (Exhibit 11).

36. Following my conversation with Mr. Neffler, I telephoned Mr. Walker at J.C. PENNEY and apprised him of the continuing difficulties with the UNION-TRIBUNE and asked Mr. Walker to arrange a three-way meeting with J.C. PENNEY, the UNION-TRIBUNE and MARKET/MEDIA to resolve them and get the project underway.

37. That meeting did not occur, but Dick Applegate, division manager of major accounts at the UNION-TRIBUNE, told me in a telephone conversation on August 22, 1988, that he had met with Mr. Walker on August 12, but that Mr. Neffler was again handling the project for the UNION-TRIBUNE and that I should talk to him.

38. On August 24, 1988, I spoke to Mr. Neffler. Mr. Neffler said he had just returned from vacation, but that he had received a report from Mr. Applegate on his meeting with Mr. Walker and that Mr. Applegate had reported that J.C. PENNEY was no longer really interested in the project and that it seemed to be "dead in the water." I told Mr. Neffler that I had spoken to Mr. Walker shortly after his meeting with Mr. Applegate and that J.C. PENNEY was in fact very much interested in proceeding with the demonstration project and had so informed Mr. Applegate. I told Mr. Neffler that I understood from my conversation with Mr. Walker that Mr. Applegate had told Mr. Walker the UNION-TRIBUNE planned to proceed with the project and would call me to set up a meeting to get the field work underway. Mr. Neffler reaffirmed that Mr. Wilson was the person actually making the decisions regarding the project and that I should arrange for Mr. Walker to verify J.C. PENNEY'S continued interest directly to Mr. Wilson.

39. Following my conversation with Mr. Neffler, I telephoned Mr. Walker at J.C. PENNEY on August 24, 1988. I told him that I had not received the call Mr. Applegate had told him would be forthcoming from the UNION-TRIBUNE and that when I had spoken to Mr. Neffler earlier in the day he indicated there was still confusion at the UNION-TRIBUNE over the $300,000.00 in new J.C. PENNEY revenue and that Mr. Neffler had suggested a call from Mr. Walker to Mr. Wilson to clear up the confusion. I subsequently learned from Mr. Walker that he had made a call to Mr. Wilson on or about August 29, 1988, at which time he confirmed the $300,000.00 available to the UNION-TRIBUNE under the terms set forth in my May 24, 1988 letter to Mr. Wilson and that Mr. Wilson himself agreed to call me and make plans to proceed with the demonstration project.

40. When I spoke to Mr. Wilson on September 6, 1988, Mr. Wilson told me that Mr. Neffler was still handling the project. I replied that when I had last spoken to Mr. Neffler he had indicated to me that the corporate staff would cooperate fully with the project as proposed by MARKET/MEDIA and that he had so advised

Mr. Wilson. Mr. Wilson replied: "Look, we're just jerking you around." He added that there was "no longer any urgency" about the project and that the UNION-TRIBUNE would not pay MARKET/MEDIA for its work. I told Mr. Wilson that the UNION-TRIBUNE and MARKET/MEDIA had a binding contract to do the project and that MARKET/MEDIA had fully performed its obligations and expected the UNION-TRIBUNE to do likewise. I told Mr. Wilson he would be receiving an invoice in accordance with the terms of the Services Agreement sent to him on May 24 and that if the UNION-TRIBUNE breached the agreement, I would take whatever steps were necessary to protect MARKET/MEDIA'S interests.

41. Exhibit 12 is a copy of my letter to Mr. Wilson dated September 7, 1988, enclosing an invoice in the amount of $71,750.00 as the first installment of the Survey Fee described in the Services Agreement. The receipt identified as Exhibit 13 indicates that the letter and invoice were received on September 12, 1981.

42. In response, I received a letter dated October 3, 1988 (Exhibit 14). The letter is signed by Harold W. Fuson, Jr., vice president and general counsel of Defendant THE COPLEY PRESS, INC., who states that he has "reviewed the circumstances of your discussions with UNION-TRIBUNE and COPLEY PRESS employees" and found "no evidence that any promise was ever made to you...No commitment was ever made to you, and nothing of value has been received from you. You can expect no payment to be made."

43. Following my September 6 telephone conversation with Mr. Wilson and receipt of the October 3, 1988, letter from Mr. Fuson, I spoke to Mr. Walker on several occasions in an effort to shift the demonstration project to another market. Because of new commitments resulting from an internal reorganization at J.C. PENNEY in which Mr. Walker received additional job responsibilities and the realignment of the states in J.C. PENNEY'S regions, Mr. Walker was unable to devote the time necessary to set up a similar project in a different market.

44. Since September 6, 1988, we have been unable to set up any other demonstration project with the J.C. PENNEY CO.

45. Since the wrongful acts of the UNION-TRIBUNE in 1988 became known, newspapers with whom MARKET/MEDIA was negotiating for a related project in North Carolina terminated the negotiations and the Newspaper Advertising Bureau has ceased making any efforts to set up similar demonstration projects

anywhere in the country.

46. THE COPLEY PRESS, INC. is a publishing conglomerate which owns and operates dozens of daily and weekly newspapers in California and Illinois. The largest of its papers is the San Diego UNION-TRIBUNE with combined paid daily circulation of 373,981 and paid Sunday circulation of 411,102 in San Diego County. The publisher's statement dated September 30, 1987 (Exhibit 15) was among the materials sent by Mr. Wilson in March, 1988. The UNION-TRIBUNE is the dominant mass medium and only metropolitan daily newspaper in the Southern District of California, the jurisdiction to which Defendants seek to have this action transferred. Plaintiff believes the possibility of prejudice to be self-evident.

47. All of MARKET/MEDIA'S business records which are material to the issues of this case are located in Ohio. This affiant, whose testimony will be crucial to MARKET/MEDIA'S presentation of its case, is a resident of Ohio. Defendants are seeking documents and information pertaining to similar projects for other newspapers located in Ohio. Potential witnesses, should Defendants succeed in establishing the relevance of their testimony, are residents of Ohio whose appearance in Southern California could not be compelled by either side.

48. The letter from Mr. Fuson breaching the contract and falsely and fraudulently denying the existence of any contractual or other obligation of the UNION-TRIBUNE or COPLEY PRESS to the Plaintiff was mailed to Plaintiff at its office in Ohio. The cause of action for Plaintiff's contract claims, as well as for its tort claims, arose in Ohio. The injuries to the Plaintiff were sustained in Ohio and their attendant financial consequences impact directly upon the economy of Ohio.

49. Transfer of this action to the Southern District of California would impose a severe financial burden on MARKET/MEDIA which has suffered great harm and loss as a result of the wrongful conduct of the Defendants.

/s/ Robert E. L. Rhodes, III
ROBERT E.L. RHODES, III

SWORN to, acknowledged and subscribed in my presence, this 20th day of December, 1990.

/s/ Owen C. Neff
NOTARY PUBLIC

Exhibit 1

UNION-TRIBUNE PUBLISHING CO.
(Letterhead omitted in printing)

March 30, 1988

Robert Rhodes
Market Media Research
4779 Columbia Road
North Olmsted, OH 44070

Dear Robert:

With respect to our conversation, I'm enclosing an ABC Publisher's Statement and several of our publications that provide information on San Diego.

After you've looked these over, please let me know how you want to proceed.

Sincerely,

/s/ Gerry F. Wilson/lh
Gerry F. Wilson

GFW/lh

Exhibit 2

UPS Overnight Shipping Document
(Omitted in Printing)

Exhibit 3

**MARKET/MEDIA RESEARCH, INC.**

Letterhead

May 24, 1988

Mr. G. F. Wilson, Jr.
Director of Marketing
Union-Tribune Publishing Co.
350 Camino De La Reina
San Diego, California 92108-3090

Dear Mr. Wilson:

Enclosed is our proposal for the JCPenney project.

If market research is to be useful to retailers, it must focus attention on the things management can do to increase sales and make stores more profitable. Since advertising determines how much of a store's potential it actually achieves in any particular market, advertising, if understood properly and used effectively, is management's most powerful tool for improving a store's bottom line performance. The problem is that advertising is understood poorly, if at all, by most retailers and is seldom, if ever, used effectively as a tool to maximize sales and earnings in individual markets.

Our business, as a research and consulting company, is to use research to make money for retailers and the newspapers they advertise in rather than merely to publish descriptive statistics about the markets they share. Descriptive statistics are, of course, useful by-products of market research and we can generate all the data you now publish in your shopping center report and produce similar reports for department stores and discounters from the same field study.

Our proposal is divided into two main parts. The first describes the field work required to gather the data we need to model the market. The second describes our ultimate objective: to optimize the performance of JCPenney in the San Diego market.

Conversations with Larry Walker suggest that a local ROP budget in the neighborhood of 2 per cent of current merchandise sales in San Diego County is what we can expect to work with initially. That would amount to an increase of $300,000 a year to the Union-Tribune in revenue shifted from the local pre-print program. Once the field work is completed, we will prepare a formal demonstration project in which the advertising budget will be used as a management tool to optimize the profitability of Penney stores in the San Diego market. The dollar amount of that budget will depend on the results of the study.

As you know from Larry's recent remarks on the subject, internal sales data indicate that when Penney advertises the same goods in pre-prints and ROP, the pre-prints generate more unit sales of the specific goods advertised, but the ROP ads generate more storewide sales at greater average profit. In line with corporate policy, we would first want to optimize national pre-print distribution, but in San Diego that is at most a minor adjustment that can be accomplished with San Diego Plus. (From what Larry tells me, the details of that are about worked out.) Most of the additional advertising exposure would be gained through local ROP, and the merging of the San Diego district advertising office into the LA Metro office in August creates a timely opportunity to begin it.

Larry believes, and I agree, that we should have the field work and preliminary analysis completed by late July. The field work itself will take five to six weeks, so we should plan on getting it underway by June 10 if at all possible. I have completed the preliminary study design and will finish work on the questionnaire this week. The timing of the study couldn't be better given the changes that are taking place inside the Penney organization.

I am also enclosing copies of our standard Services Agreement adapted to the requirements of the JCPenney project. Please let me know if you have any questions.

Sincerely,

Robert E. L. Rhodes
President

Enclosures

Exhibit 4

## RESEARCH PROPOSAL FOR THE UNION-TRIBUNE PUBLISHING CO.

The purpose of the field study is to gather data on department stores, discounters, specialty apparel stores and shopping centers in San Diego County. For each we will identify its trading area by ZIP Code, its actual and potential customers, its position or niche in the market, its image and its competitors.

### TRADING AREA DEFINITION

We will identify the trading areas of each department store and shopping center by ZIP Code according to the relative frequency with which residents shop there. This technique will correct the bias caused by differences in the number of households among the ZIP Codes. This correction was not made in your shopping center study (nor is it generally made by retailers), but the bias creates problems if one is trying to explain or modify shopping behavior.

Retailers typically draw 95 per cent of their customers from within the boundaries of their trading areas and virtually all differences in shopping probabilities can be explained by long--term differences in exposure of market residents to the retailers' advertising.

### ACTUAL AND POTENTIAL CUSTOMERS

We will identify both actual and potential customers of each store and shopping center in the market. The ratio of actual to potential customers changes (other things equal) in direct proportion to their exposure to the retailer's advertising.

### COMPETITORS

For some years, the share of Effective Buying Income spent on department store merchandise has declined while the share of EBI spent on fast food restaurants, for example, has increased dramatically. A department store's real competitors for the consumer's dollars are not other department stores (or discounters or specialty shops) but those who sell things other than department store type merchandise. Most retailers believe that each dollar they gain comes at the expense

of another store selling the same kind of merchandise, but the evidence suggests that when all merchants of particular goods advertise more, the total number of dollars spent on that type of merchandise increases in direct proportion to the total increase in advertising.

To be precise, the advertising elasticity of most retail goods is quite high, unitary or near-unitary over the significant range of the demand function. We want to test that view rigorously by comparing the results for JCPenney in the San Diego market (where we will seek to optimize Penney's performance exclusively) with the results for Penney in Winston-Salem, N.C. (where we will seek to optimize, simultaneously, the results of all retailers in the only major shopping mall serving a multi-county regional market).

## MARKET POSITION

The market position of a retailer is determined by its merchandising, the merchandising of other retailers selling the same or similar types of goods, and the demographic constraints acting on shoppers within the market. Market position ultimately determines a retailer's potential sales within the market, and it is impossible to estimate accurately what any retailer's potential sales may be without knowing the position of all other local merchants of similar goods.

San Diego is an excellent market for studying the effect of other merchants on the market position of a department store like JCPenney. Demographic differences among the trading areas of major shopping centers are differences of degree rather than stark contrasts. Just taking Penney for example, there is a free standing store in El Cajon, an outlet store at College Grove, and metropolitan department stores at Chula Vista, Fashion Valley, North County Fair, Plaza Bonita and Plaza Camino Real.

At Chula Vista, The Broadway is the only other anchor. At Fashion Valley, there are The Broadway, Buffums, Neiman-Marcus, Nordstrom and J.W. Robinson's. At North County Fair, one finds The Broadway, May Co., Nordstrom, J.W. Robinson's and Sears. At Plaza Bonita are May Co., Mervyn's and Montgomery-Ward. Plaza Camino Real offers Bullock's, The Broadway, May Co. and Sears. Mervyn's co-anchors College Grove with the Penney outlet store.

We will determine each customer's first, second and third store choice for each merchandise line. Comparative data for each store will show how the presence or absence of particular competitors affects the probability of a customer's choosing JCPenney for one or

more lines of merchandise.

## STORE IMAGE

"Human beings attend to or disregard the world in which they live. They search for things in that world. They generalize from one thing to another. They discriminate. They respond to single features or special sets of features as 'abstractions' or 'concepts.' They solve problems by assembling, classifying, arranging and rearranging things. They describe things and respond to their descriptions as well as to descriptions made by others. They analyze the contingencies of reinforcement in their world and extract plans and rules which enable them to respond appropriately without direct exposure to the contingencies. They discover and use rules for deriving new rules from old. In all this and much more, they are simply behaving, and that is true even when they are behaving covertly." -- B. F. Skinner

A store's image is what people expect of the store. When we say someone plans, expects or intends to behave in a certain way, we are describing a choice that person has made about something to be done at another time and possibly in another place.

Four out of five retail shoppers leave home intending to make a particular purchase from a particular store. They have expectations of the quality, selection, style and price of the merchandise to be found at particular stores and shopping centers, of the relative convenience of those places for shopping, of the level and kind of service they will receive from store personnel, of the store's willingness to make adjustments and refunds on unsatisfactory purchases, of the kinds of people who shop particular stores, of the physical appearance of the store and perhaps of other salient features that distinguish one store from another.

The shopper's expectations about stores may have been shaped by personal experience, by the reports of other people or by exposure to the stores' advertising. By analyzing the components of store image we can learn how to optimize a store's position in the market and to increase its sales potential in predictable ways.

## SAMPLE

The size of a simple random sample is like the resolving power of a microscope: the higher the resolution, the more detail you see. A sampling rate of 1 per cent will give adequate resolution for merchandise line customers, demographic segments and geographical areas

comprising 15,000 households. Given the size of ZIP Code areas and the nature of the San Diego market, I believe this is an adequate sampling rate for our study that will result in the selection of about 8,200 householders to be interviewed.

COST

The cost per interview, based on a 10-minute length, will be $17.50. This includes design of the study, field work, data tabulation and the initial data analysis and demonstration project design for JCPenney. The total cost for 8,200 interviews amounts to $143,500. Additional work after the demonstration project is approved by Penney will be billed at $50 per hour for the time actually spent.

I understand your research department draws the sample for your on-going projects like the shopping center study. Since the shopping center data so closely match Penney's STAD data, we would like you to draw the sample for this study using the same technique.

WHY JCPENNEY...WHY SAN DIEGO...AND WHY NOW?

Our basic research over the past 12 years has shown that advertising is the most powerful tool available to retail management to increase the sales and earnings of existing stores. The objective of the JCPenney project in San Diego is to show how that tool can be used to optimize Penney's performance in an individual market -- to measure current performance against the potential of the market and to develop a specific plan to achieve each store's full potential for profitability.

The retailer makes promises of satisfactory purchases to potential customers through its advertising that must be fulfilled through its merchandising. This pairing of promise and satisfaction over a long period of time shapes the behavior of shoppers and is the source of the power of advertising to alter shopping behavior.

For advertising to be efficient, the merchandising of a store must be properly tuned to its market. The restructuring that has occurred within the Penney company during the past year and the strategies that have evolved to reposition the store in the market make it the ideal candidate for our demonstration project.

Penney's buying and marketing functions have been united in four major merchandising divisions: women's, men's, children's and home and leisure. Each merchandise division has been turned into a specialized marketing organization with profit and loss responsibili-

ties and sophisticated systems for inventory control. The Direct Broadcast Network (DBN) links store buyers directly to central purchasing facilities and provides the technology for just-in-time purchasing and the actual capability to tune each individual store to achieve its optimal sales and earnings whatever the circumstances peculiar to its own individual market.

The repositioning strategy is eliminating low-margin merchandise lines and expanding high-margin lines. As new stores are being built and existing stores retrofitted, net selling space as a percentage of gross leased area is increasing and the space devoted to particular kinds of merchandise is being determined by earnings potential. Not only are earnings increasing year-to-year, but earnings as a per cent of sales are rising. The whole focus of management attention is on profitability.

Advertising, however, is still thought of as an expense to be controlled rather than as a tool for increasing the profitability of stores.

Substantial changes have occurred in the advertising operation of Penney coinciding with the relocation of the corporate staff to Dallas. Both the organizational structure and the cast of characters has changed. A major new program to computerize market and media data is starting up under the aegis of John Penaska. With the retirement of Sid Stein, the corporate research department was abolished and research responsibilities were given to each merchandising division. Pam Proctor, as the new project manager in advertising, will take on some responsibility for advertising research projects. The main shift seems to be away from corporate directed research, toward corporate response to projects initiated in the field.

The San Diego market is especially well suited to serve as a model project. It is relatively simple and generally typical of Penney markets everywhere. The good reach provided by the Union-Tribune fairly evenly over most of the county means we can do things immediately in San Diego that would need a couple of years working out coverage problems in many other markets; and San Diego is a cost-effective newspaper buy for Penney.

The close agreement of the Union-Tribune shopping center study data with Penney STAD data in identifying trading areas, means that in this market at least Penney charge card customers are randomly distributed and most Penney store trading areas match the trading areas of the malls they are in. In that case, monitoring Penney charge account activity should accurately meter what is going on in the market as a

whole.

The timing for such a project could not be better. The merging of the San Diego advertising office into the LA metro office the first of August will coincide with the time when the new corporate people will be getting down to business in Dallas.

## THE JCPENNEY DEMONSTRATION PROJECT

When the field study is completed, we will use the data to prepare the formal demonstration project plan for JCPenney stores in San Diego County. The overall objective; as I have said, will be to show how advertising, potentially the most powerful tool available to management to increase the sales and earnings of existing stores, can be used to optimize Penney's performance in individual markets. We will compare current performance against the potential of the market and develop a specific operational plan to achieve each store's full potential for profitability in the San Diego market.

There are four well-defined steps in the process:

### I. OPTIMIZE MEDIA REACH

One of JCPenney's corporate objectives for 1988 is to obtain optimal, cost effective household coverage for its national pre-prints. That means reaching as many of the households within a store's trading area as possible at a cost that is reasonable in light of the additional sales that will result from the increased coverage. Ultimately it comes down to a question of how many non-subscriber households in a given area are potential Penney customers. We can identify potential customers directly in our field study -- something retailers have previously been unable to do. We will also be able to tell which Union-Tribune non-subscribers who are potential Penney customers in each store's trading area are reached by San Diego Plus.

Optimized reach is also important for the new local ROP ads that will be used to increase total advertising exposure within a store's trading area.

To achieve both objectives we will:

a. Identify the trading area of each store and its primary, secondary and tertiary drawing areas.

b. Identify actual and potential Penney customers within the trading areas.

c. Calculate the cost of reaching current non-subscribers within the stores' trading areas with pre-prints and ROP ads.

d. Determine from those data the optimal household coverage for each store trading area and the market as a whole.

## II. OPTIMIZE ADVERTISING PRESENCE

When the proper reach has been achieved in a market, the question becomes, What is the optimal amount of advertising to reach them with? Where is the point of diminishing returns -- beyond which ever larger increases of advertising exposure produce ever smaller increases in sales?

The practical problem is to determine the quantity of advertising exposure (lines x households reached) needed to make the actual to potential customer ratio (actual customers/potential customers) as close as possible to 1. Ignoring for the moment the content of the ads, what percentage increase in quantity is needed to make the number of actual Penney customers in a market as close as possible to the number of potential Penney customers?

Since we will measure the numbers of actual and potential Penney customers directly, the percentage difference will be easy to compute.

## III.OPTIMIZE THE RATIO OF ADVERTISING EXPENDITURES TO SALES TO MAXIMIZE THE PROFITABILITY OF EXISTING PENNEY STORES.

When you are reaching as many of the potential customer households as you practically can within the trading areas of your stores, what is the right amount of money to budget for advertising as a percentage of expected sales? The answer is not, as many might suppose, a matter of opinion. Using the methods of microeconomics, it is possible to calculate the right amount to spend for advertising in order to maximize the profits of the retailer.

It turns out that budgeting a fixed percentage of expected sales is the optimal strategy. The correct amount to spend for advertising is reached when another $1,000 spent to buy additional advertising will increase sales by exactly the same amount that reducing the price of the merchandise offered for sale by $1,000 will produce (in economic parlance when advertising elasticity is equal to price elasticity). This is called the Dorfman-Steiner condition after the Berkeley economists who proved it.

Everybody loves a sale, and if having one once or twice a year moves a lot of merchandise, why not have one every week or every day? It may sound silly put that way, but that is just the situation retailers have gotten themselves into in recent years. By overdoing price promotions, stores have trained customers never to pay full price for anything. Margins have been eroded, the value of merchandise has been cheapened in the eyes of the consumer and retail ads have become little more than notices for clearance sales.

The practical problem here is to find the proper proportion of price promotional advertising to advertising that simply calls attention to the availability of merchandise at regular price. If regular price merchandise is sold at 50 per cent margin, a 25 per cent off sale means the retailer must sell twice as many units to make the same profit.

At this stage we are not concerned with what is advertised, only the effective margin on advertised merchandise. We want to find where the Dorfman-Steiner condition is reached by JCPenney in the San Diego market.

## IV. OPTIMIZE THE PRODUCTIVITY OF JCPENNEY ADVERTISING

The final step is to look at what goes into the Penney ads. What merchandise should be advertised together to get the most bang for the buck?

Two-thirds of the families that purchase men's clothing from a particular department store are families that purchase women's clothing from that store. Should men's clothing be advertised in proximity to the ads for women's clothing? What split in the ad space devoted to women's and men's apparel will produce the greatest volume of sales? Do price elasticities change when different merchandise lines are advertised together? Do advertising elasticities change for one line when another is price promoted?

The list of fascinating questions about what should go into ads to increase advertising productivity is nearly endless, but none of them can be answered satisfactorily until the quantitative problems listed in steps I, II and III have been solved and the Dorfman-Steiner condition has been achieved.

## SERVICES AGREEMENT

This agreement, made at Cleveland, Ohio, as of this ___ day of _____, 19__, by and between MARKET/MEDIA RESEARCH, INC., an Ohio corporation, which with its successors and assigns is herein called "Research", and UNION-TRIBUNE PUBLISHING CO., a _____ corporation, which with its successors and assigns is herein called "Client", is to EVIDENCE THAT:

WHEREAS Research has devised and offers for sale a marketing research plan (herein called the "Plan"); and

WHEREAS Client desires to engage Research to provide telephone survey and other data gathering services, analysis, consultation and reporting services, and customized computer services (herein collectively call the "Services") in connection with the implementation of the Plan;

NOW, THEREFORE, in consideration of the foregoing statements and the mutual covenants and promises made in this Agreement and for other valuable consideration (the receipt and sufficiency of which are hereby acknowledged), Research and Client (herein collectively called the "Parties") agree as follows:

1.Agreement Term.

1.1 The term of this Agreement (herein called the "Agreement Term") shall commence on _____, 19__.

1.2 The Agreement Term shall continue until terminated as provided in this Agreement.

2. Engagement of Research. Subject to the terms and conditions of this Agreement, Client hereby engages Research to render the Services designated in Section 3 of this Agreement, and Research hereby agrees to perform, as an independent contractor, the Services in accordance with the terms and conditions of this Agreement.

3. Duties and Responsibilities of Research.

3.1 In return for the Survey fee, Report fee, Traffic Monitoring fee and Computer fee paid hereunder by Client, Research shall provide the Services designated in this Section 3 as an independent contractor.

3.2 Research shall design and conduct telephone survey or other appropriate data gathering services (herein called "Survey Services") which shall include design of the study, relevant field work, data entry, and preliminary tabulation and analysis of the data. The Survey Services shall focus on the study area of San Diego County, California, with a general goal of collecting data on department stores, discount and specialty apparel stores and shopping centers in order to develop a demonstration project for JCPenney Co. in San Diego County. The telephone survey services for Client shall be based upon a simple random sample of 8,200 households with telephones in the survey study area.

3.3 Research shall provide analysis, consultation and reporting services (herein called "Report Services") to Client on a mutually agreeable basis in order to interpret the data generated through the Survey Services. Upon mutual consent of the Parties, Research shall generate reports for shopping centers, store groups, individual stores, merchandise lines, geographical areas or other targeted market segments.

3.4 Research shall provide computer diskettes which contain copies of the completed survey data base (herein called "Computer Services") to Client together with an MS-DOS version of the tabulation software utilized by Research. The Computer Services shall be customized for use by the advertisers of Client and shall include the formulas used to select from the data base the potential and actual customers of the store and its store group, merchandise lines and competitors.

3.5 Research shall design and install electronic equipment to monitor shopper traffic patterns (herein called "Traffic Monitoring Services") in stores to be designated upon mutual consent of the parties.

4. Duties and Responsibilities of Client.

4.1 Survey Fee. In return for only the Survey Services described in Section 3.2 herein, Client shall pay Research a basic fee (herein called the "Survey Fee") in the amount of One-Hundred-Forty-Three-Thousand-Five-Hundred Dollars ($143,500.00).

4.2 Installments of Survey Fee. Client shall pay the Survey fee in three (3) installments which shall become due and payable as follows: 50% upon completion of the designed study; 25% upon the completion of the field work; and 25% upon completion of preliminary tabulation and analysis. Research reserves the sole

discretion to determine the date each work segment has been completed.

4.3 Report Fee. In return for only the Report Services described in Sections 3.3 herein, Client shall pay Research an analysis, consultation and report fee (herein called the "Report Fee") in the amount of Fifty dollars ($50.00) per hour for each and every hour Research expends in completing the Report Services.

4.4 Installments of Report Fee. Client shall pay the Report Fee within thirty (30) days after Research bills client for the Services rendered during each monthly period.

4.5 Computer Fee. In return for only the Computer Services described in Section 3.4 herein, Client shall pay Research a computer fee (herein called the "Computer Fee") in the amount of Eight Hundred Dollars ($800.00) per copy for each complete computer study ordered by Client. Client shall pay the Computer Fee upon receipt of each complete computer study.

4.6 Traffic Monitoring Fee. In return for only the Traffic Monitoring Services described in Section 3.5 herein, Client shall pay Research a fee equal to the monthly lease payments, based on a 36-month lease with a 10 per cent residual value, of the equipment used in performing the Traffic Monitoring Services.

4.7 Travel Expenses. Client shall pay Research the reasonable travel expenses of Research personnel for any travel on behalf of Client requested or authorized by Client during any monthly period. Client shall pay the travel expenses within thirty (30) days after Research bills Client for the expenses.

5. Termination.

5.1 This Agreement and the Agreement Term shall continue until the Services designated in Section 3 herein have been fully performed, except as otherwise provided herein.

5.2 Notwithstanding any contrary provision herein, either Party may terminate this Agreement and the Agreement Term if the other Party breaches this Agreement; provided, however, that the terminating Party shall give the breaching Party written notice of such breach and sixty (60) days thereafter to correct the breach before terminating this Agreement.

6. Miscellaneous.

6.1 This Agreement constitutes the entire agreement between Research and Client regarding the subject matter hereof and all prior written or oral negotiations, representations, arrange-

ments and/or agreements regarding the subject matter herein are merged into and superseded by this Agreement. Research and Client acknowledge that there are no oral or written understandings, arrangements and/or agreements between the Parties relating to the subject matter of this Agreement.

6.2 All provisions of this Agreement are severable and no provision hereof shall be affected by the invalidity of any other such provision.

6.3 No action by Research and no refusal or neglect by Research to exercise any right hereunder or to enforce compliance with the terms of this agreement shall constitute a waiver of any provisions herein with respect to any violations, actions or omissions hereunder, unless such waiver is expressed in writing by Research.

6.4 This Agreement may be amended, altered or changed only by a written document signed by Research and Client.

6.5 For purposes of this Agreement, the singular includes the plural and vice-versa and the feminine, masculine and neuter include each other.

IN WITNESS WHEREOF, the Parties hereto have set their hands as of the day and year first written above.

In the Presence of: MARKET/MEDIA RESEARCH, INC.

_____ By: _____

(Signature of First Witness) Robert E. L. Rhodes, President

_____

(Signature of Second Witness) "Research"

UNION-TRIBUNE PUBLISHING CO.

_____ By: _____

(Signature of First Witness) (Name and Title)

_____

(Signature of Second Witness) "Client"

Exhibit 6

**MARKET/MEDIA RESEARCH, INC.**

Letterhead

September 7, 1988
Union-Tribune Publishing Co.
P. O. Box 191
San Diego, California 92112-4106

| | |
|---|---|
| Survey fee, first installment | $71,750.00 |

Exhibit 7

**MARKET/MEDIA RESEARCH, INC.**
Letterhead

June 2, 1988

Mr. G. F. Wilson, Jr.
Director of Marketing
Union-Tribune Publishing Co.
P. O. Box 191
San Diego, California 92112-4106

Dear Mr. Wilson:

Enclosed are the lists of stores and locations compiled from shopping center and telephone directories for the Union-Tribune study.

We can produce the same kind of analyses for each of the stores in the Question 7 list as we can for JCPenney. Please check the list both for completeness and to ensure that the location descriptions used by the directories are the same ones San Diegans use. Penney people tend to call the North County Fair store the "Escondido store." I suspect shoppers are more likely to use the mall name. When the lists are complete, we will alphabetize and code locations for display on the interviewers' CRTs, so I would like to list the most common description first and then any other descriptive label after the slash. If any of my descriptive labels need to be reversed, please let me know.

The Question 14 stores will be coded and displayed on interviewers' CRTs as answers to questions about where respondents would most likely shop for particular lines of merchandise. The display will be in three-column format with the department store list and the discount/general merchandise list displayed for each merchandise line. The third column will change, displaying the particular specialty stores appropriate for each line. Obviously "military exchange" will be included in each display. Please add any stores that may have been overlooked to any of these lists. Tabulation will be easier if we group top-line department stores, discount stores and specialty shops. Please note any changes in grouping that should be

made. Since these lists are for display for interviewers only, I would like to include all stores that may be worth analyzing separately in the listing. Otherwise they will be coded 'all other.'

I have not enclosed a copy of the questionnaire because Larry Walker is sending an Orange County study with what he says are interesting findings with respect to store image components. I should have it tomorrow and I want to review it before I lock up our own image questions.

To correlate this study with your last shopping center study, we should include the exact question you used to measure traffic in the malls in the past 30 days. I will need the wording of that question from you.

I look forward to talking with you early next week.

Sincerely,

Robert E. L. Rhodes
President
Enclosures

Exhibit 8

UNION-TRIBUNE PUBLISHING CO.
(Letterhead omitted in printing)

June 22, 1988

Robert E. L. Rhodes
President
Market/Media Research, Inc.
4779 Columbia Road
Cleveland, Ohio 44070

Dear Mr. Rhodes:

Thank you for your interesting proposal regarding J.C. Penney and the Union-Tribune Publishing Company. We are currently reviewing your ideas in our corporate offices.

Stu Neffler, Marketing Director of Copley Press will contact you soon.

Sincerely,

/s/ Nancy B. Coleman

Nancy B. Coleman

NBC:gap
cc: Stu Neffler

Exhibit 9

UPS Overnight Shipping Document
Omitted in Printing

Exhibit 10

**MARKET/MEDIA RESEARCH, INC.**
Letterhead

August 2, 1988

Mr. G. F. Wilson, Jr.
Director of Marketing
Union-Tribune Publishing Co.
350 Camino De La Reina
San Diego, California 92108-3090

Dear Mr. Wilson:

This letter has further reference to our JCPenney project. I had a telephone conversation with Stu Neffler July 21 and he told me you are mired in labor negotiations through the end of this week. May firmer ground be presently beneath your feet.

Our discussions focused on two main areas: (1) the relation between our JCPenney project and the continuing studies done for the U-T by the corporate research department and (2) the financial consequences for the newspaper of shifting the budget for JCPenney local advertising from pre-printed inserts to ROP in the Union-Tribune.

With respect to the first matter, we agreed to cooperate fully to make best use of the data available from all sources. We will work out the details in a forthcoming meeting in San Diego.

With respect to the second, he asked that I send you both a marginal cost and revenue analysis showing the incremental profit to the U-T to be realized from the plan. That analysis is enclosed. The bottom line is that about 70 cents of each dollar in new revenue is added profit for the newspaper.

Major changes have occurred during the past two or three weeks in the Penney company, some of which you probably know about and others you may not. Scott Frahlich, executive vice president and director of JCPenney stores, suddenly retired and Jim Oesterreicher, western regional president was named to succeed him. Bill Ferguson, who was Ron Schuller's predecessor as JCPenney's top advertising executive, is the new western region president.

You will recall I mentioned some time ago that Larry Walker was due for a promotion that would either mean a transfer to Dallas or a bigger job in the Western Region. The announcement is being made internally this week. The changes are rather complicated, but in essence Larry went to bed one night a major and woke up a brigadier general. He will stay in the Western Region in a job created especially for him -- there's no other comparable position in the company. As I understand it, he'll have line responsibility for all JCPenney advertising (national, local, budgeting and production) and market research for every store in the 11 western states. All JCPenney ads for all JCP stores will be produced in three metro offices -- LA, San Francisco and Seattle -- effective November 1. The production offices will report directly to the region.

Talk about being in the catbird's seat. If he can take a market like San Diego and increase sales predictably by 20 to 40 per cent (which I believe is possible) and profits by 50 to 100 per cent (which I also believe is possible) he'll collect a few more stars real fast.

Let me know when you've had a chance to digest the enclosed analysis.

Sincerely,

Robert E. L. Rhodes
President
Enclosures
Copy: Stu Neffler

DATE: August 2, 1988
TO: G. F. Wilson, Jr.
FROM: Robert E. L. Rhodes
SUBJECT:Financial consequences of shifting JCPenney local advertising from pre-printed inserts to ROP with a net increase of revenues for the Union-Tribune

Shifting JCPenney local advertising from pre-printed inserts to ROP and using San Diego Plus to increase reach in some ZIP Codes in the northern part of the county would result in a net revenue increase of $300,000 and an incremental profit of some $210,000 for the Union-Tribune. Each new dollar of advertising revenue generates approximately 70 cents in profit for the newspaper.

In making a marginal or incremental cost and revenue analysis to determine the effect of any decision on a company's operating profits, we ask the question: What things change, what things stay the same? Things that change (the consumption of newsprint and ink, for example) enter into our calculation of incremental or marginal profit, things that don't change (the publisher's salary, depreciation of fixed assets) do not.

By considering only costs and revenues that change as a result of shifting JCPenney's local advertising from pre-prints to ROP, we gain insight into the actual contribution to profit that results from the shift. If the marginal revenue is greater than the marginal cost, the shift results in higher profit for the U-T because the productivity of existing resources (equipment, labor, etc.) increases.

For 1988, JCPenney has run or scheduled a total of 27 pre-printed inserts for the Union-Tribune that will generate an estimated $301,305 in revenue for the U-T. Printing costs amount to approximately $250,000. Shifting both amount to ROP would generate $551,305 in ROP revenues. These are the data I have used in the attached financial analysis. An additional $50,000 could be committed to San Diego Plus to reach non-subscriber households in the northern part of the county. I do not have sufficient data to make a detailed marginal analysis, but my previous experience with similar products suggests that 70 cents of each dollar in new San Diego Plus revenue should carry to the bottom line. Knight-Ridder's experience with its "Neighbors" product for non-subscribers confirms that estimate.

Looking at expenses, most will be unaffected by the shift and do not enter into our calculations. Of those that do:

--Mailroom costs for handling the inserts (estimated at $4 per thousand) will be eliminated, thereby saving $41,720.

--JCPenney ads will be camera-ready so marginal costs for the production department will be limited to camera and plate-room costs. Typically, $4 per page will cover film, plates, chemicals and wastage. Replating for each paper: 62 pages x 2 x $4 = $496.

--Newsprint and ink costs amount to $93,310. (64 pages net per pound of newsprint at 29.75 cents per pound ($595 per short ton) plus ink and pressroom supplies at 10% of newsprint cost) Thus a full page ad results in incremental production costs of $1,512.90.

If the U-T had a detailed cost accounting system, we could enumerate other small incremental costs -- a dollar amount for extra minutes of running time on the presses and so on. My own experience with newspapers whose operations I have tracked over a period of years is that allowing 10 per cent of the incremental revenue ($25,000.00 in this case) for indirect costs makes all year-end financial surprises pleasant ones. Half that amount is slack for possible price increases in materials and labor during the forecast period. The bottom line is that selling a dollar's worth of new advertising generates incremental profits of 70 to 75 cents for the newspaper, depending on such factors as whether the ads come camera-ready or have to be set, the additional time demands on dispatch if, for example, the advertiser is a local independent doing its own lay-outs that require proofs and possible copy change.

For the shift of JCPenney pre-prints to ROP, net expenses (net marginal costs) amount to 30.8 per cent of net (marginal) revenues. The incremental profit is therefore 90.2 per cent of the marginal revenue generated by the switch. In dollars, the U-T gains $172,914 in added profits from the insert-to-ROP switch. Profits from 450,000 new revenue in San Diego Plus would be about $35,000. The total addition to profits for the U-T from both sources would therefore come to $207,914 on marginal revenue of $300,000 (69.2 per cent).

The blank column headed "UNION-TRIBUNE" will allow you to enter cost data based on the U-T's own experience for any category for which they may be available.

## MARGINAL COST/REVENUE ANALYSIS OF JCPENNEY ADVERTISING BUDGET CHANGE

| | STANDARD COSTS | UNION-TRIBUNE |
|---|---|---|
| REVENUES: | | |
| Advertising | | |
| ROP | 551,305 | |
| Insert | (301,305 ) | |
| Circulation | | |
| Other | | |
| Net Revenues | 250,000 | |
| EXPENSES: | | |
| Advertising | | |
| Circulation | | |
| Mailroom | (41,720) | |
| Distribution | | |
| Editorial | | |
| Production | | |
| Composing | | |
| Camera/ | | |
| Plateroom | 496 | |
| Newsprint and Ink | 93,310 | |
| Total Direct | 52,086 | |
| % | 20.8 | |
| Total Indirect | 25,000 | |
| % | 10.0 | |
| Net Expenses | 77,086 | |
| % | 30.8 | |
| INCREMENTAL PROFIT | 172,914 | |
| % | 69.2 | |

Exhibit 11

DATE: August 2, 1988
TO: G. F. Wilson, Jr.
FROM: Robert E. L. Rhodes
SUBJECT:Financial consequences of shifting JCPenney local advertising from pre-printed inserts to ROP with a net increase of revenues for the Union-Tribune

Shifting JCPenney local advertising from pre-printed inserts to ROP and using San Diego Plus to increase reach in some ZIP Codes in the northern part of the county would result in a net revenue increase of $300,000 and an incremental profit of some $210,000 for the Union-Tribune. Each new dollar of advertising revenue generates approximately 70 cents in profit for the newspaper.

In making a marginal or incremental cost and revenue analysis to determine the effect of any decision on a company's operating profits, we ask the question: What things change, what things stay the same? Things that change (the consumption of newsprint and ink, for example) enter into our calculation of incremental or marginal profit, things that don't change (the publisher's salary, depreciation of fixed assets) do not.

By considering only costs and revenues that change as a result of shifting JCPenney's local advertising from pre-prints to ROP, we gain insight into the actual contribution to profit that results from the shift. If the marginal revenue is greater than the marginal cost, the shift results in higher profit for the U-T because the productivity of existing resources (equipment, labor, etc.) increases. **(underlining added by hand at U-T)**

For 1988, JCPenney has run or scheduled a total of 27 pre-printed inserts for the Union-Tribune that will generate an estimated $301,305 in revenue for the U-T. Printing costs amount to approximately $250,000. Shifting both amount to ROP would generate $551,305 in ROP revenues. These are the data I have used in the attached financial analysis. An additional $50,000 could be committed to San Diego Plus to reach non-subscriber households in the northern part of the county. I do not have sufficient data to make a detailed marginal analysis, but my previous experience with similar products suggests that 70 cents of each dollar in new San Diego Plus revenue should carry to the bottom line. Knight-Ridder's experience with its "Neighbors" product for non-subscribers confirms that estimate.

Looking at expenses, most will be unaffected by the shift and do not enter into our calculations. Of those that do:

--Mailroom costs for handling the inserts (estimated at $4 per thousand) will be eliminated, thereby saving $41,720.

**(underlining added by hand at U-T)**

--JCPenney ads will be camera-ready so marginal costs for the production department will be limited to camera and plate-room costs. Typically, $4 per page will cover film, plates, chemicals and wastage. Replating for each paper: 62 pages x 2 x $4 = $496. **(underlining added by hand at U-T)**

--Newsprint and ink costs amount to $93,310. (64 pages net per pound of newsprint at 29.75 cents per pound ($595 per short ton) plus ink and pressroom supplies at 10% of newsprint cost) Thus a full page ad results in incremental production costs of $1,512.90. **(underlining and margin notation of "** 1250 U-T" added by hand at U-T)**

If the U-T had a detailed cost accounting system, we could enumerate other small incremental costs -- a dollar amount for extra minutes of running time on the presses and so on. My own experience with newspapers whose operations I have tracked over a period of years is that allowing 10 per cent of the incremental revenue ($25,000.00 in this case) for indirect costs makes all year-end financial surprises pleasant ones. Half that amount is slack for possible price increases in materials and labor during the forecast period. The bottom line is that selling a dollar's worth of new advertising generates incremental profits of 70 to 75 cents for the newspaper, depending on such factors as whether the ads come camera-ready or have to be set, the additional time demands on dispatch if, for example, the advertiser is a local independent doing its own lay-outs that require proofs and possible copy change. **(underlining added by hand at U-T)**

For the shift of JCPenney pre-prints to ROP, net expenses (net marginal costs) amount to 30.8 per cent of net (marginal) revenues. The incremental profit is therefore 90.2 per cent of the marginal revenue generated by the switch. In dollars, the U-T gains $172,914 in added profits from the insert-to-ROP switch. Profits from 450,000 new revenue in San Diego Plus would be about $35,000. The total addition to profits for the U-T from both sources would therefore come to $207,914 on marginal revenue of $300,000 (69.2 per cent).

The blank column headed "UNION-TRIBUNE" will allow you to enter cost data based on the U-T's own experience for any category for which they may be available.

## MARGINAL COST/REVENUE ANALYSIS OF JCPENNEY ADVERTISING BUDGET CHANGE

| | STANDARD COSTS | UNION-TRIBUNE |
|---|---|---|
| REVENUES: | | |
| Advertising | | |
| ROP | 551,305 | |
| Insert | (301,305 ) | |
| Circulation | | |
| Other | | |
| Net Revenues | 250,000 | |
| EXPENSES: | | |
| Advertising | | |
| Circulation | | |
| Mailroom | (41,720) | |
| Distribution | | |
| Editorial | | |
| Production | | |
| Composing | | |
| Camera/ | | |
| Plateroom | 496 | |
| Newsprint and Ink | 93,310 | |
| Total Direct | 52,086 | |
| % | 20.8 | |
| Total Indirect | 25,000 | |
| % | 10.0 | |
| Net Expenses | 77,086 | |
| % | 30.8 | |
| INCREMENTAL PROFIT | 172,914 | |
| % | 69.2 | |

Exhibit 12

**MARKET/MEDIA RESEARCH, INC.**
Letterhead

September 7, 1988

Mr. G. F. Wilson, Jr.
Director of Marketing
Union-Tribune Publishing Co.
P. O. Box 191
San Diego, California 92112-4106

Dear Mr. Wilson:

Enclosed is our invoice in the amount of $71,750.00 representing the first installment of the Survey Fee payable, in accordance with Paragraph 4.2 of our Services Agreement, upon completion of the designed study. The designed study was completed in June and delivered on July 7 at the request of Mr. Dan McGuckin following a lengthy telephone discussion of the terms of the agreement and the methodology to be used in the study.

From our telephone conversation yesterday, I infer that your failure to sign and return the Services Agreement was deliberate rather than an oversight; now that you have received the benefits of our work, you wish to avoid paying for it. In view of your oral declaration that you do not intend to honor your contractual obligations to us, this letter will serve as notice that unless we receive a signed copy of the Services Agreement and a check for the installment due within ten (10) days of your receipt of this letter, we will consider your failure to respond to be confirmation of an anticipatory breach of contract and will proceed accordingly.

While I appreciate the candor of your remark that you've just been jerking us around for the past few months, I find it astonishing that you should regard that as something one can do to another with impunity. A professional services company has nothing to sell but its time and knowledge, and when they are wasted we suffer a financial loss that can never be recovered. Your refusal to follow through with the JCPenney project after Penney has invested many hours in

planning is also damaging to our business relationship with the JCPenney Co.

Our obligations to you have been met fully and I can see in the course you have chosen to follow no justification whatsoever.

Sincerely,

Robert E. L. Rhodes
President
Enclosure

**MARKET/MEDIA RESEARCH, INC.**
Letterhead

September 7, 1988

Union-Tribune Publishing Co.
P. O. Box 191
San Diego, California 92112-4106

Survey fee, first installment $71,750.00

Exhibit 14

**COPLEY NEWSPAPERS**
(Letterhead omitted in printing)

HAROLD W. FUSON, JR.
Vice President
and General Counsel

October 3, 1988

Mr. Robert E. L. Rhodes
President
Market/Media Research, Inc.
4779 Columbia Road
Cleveland, Ohio 44070

Dear Mr. Rhodes:

Your letter of September 7, 1988 to Gerry Wilson has been referred to me. In your letter, you demand payment for services alleged to have been rendered to the Union-Tribune Publishing Co. in reliance on a promise to pay.

I have reviewed the circumstances of your discussions with Union-Tribune and Copley Press employees and I can find no evidence that any promise was ever made to you. Your proposal for a marketing study was carefully examined and a number of questions were asked of you in an effort to assess the quality of your methodology and the need for your services. No commitment was ever made to you, and nothing of value has been received from you.

You can expect no payment to be made.

Sincerely,

/s/ Harold W. Fuson, Jr.

HWF:lgm
xc: G. F. Wilson, Jr.

Exhibit 15

Newspaper Publisher's Statement Showing Circulation Data
(Omitted in Printing)

**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF OHIO**
**EASTERN DIVISION**

**JUDGE ALVIN I. KRENZLER**
**CASE NO. 1:90CV1586**

MARKET/MEDIA RESEARCH, INC.
Plaintiff

-vs-

UNION-TRIBUNE PUBLISHING CO.
THE COPLEY PRESS, INC.
Defendants

AFFIDAVIT

STATE OF OHIO )
) SS AFFIDAVIT
CUYAHOGA COUNTY )

ROBERT E.L.RHODES, III, being first duly sworn according to law, deposes and says:

1. I am the president of Market/Media Research, Inc., the Plaintiff herein, and have personal knowledge of the following facts.

2. I have read the Statement of Operative Facts in Plaintiff's Brief in Support of its Motion to Compel, etc., and attest the truth thereof.

3. Defendants' response to Request No. 5 concerning a telephone conversation Mr. Wilson and I had on March 25, 1988, is a prevarication. Defendants have juxtaposed a portion of a statement made by Mr. Wilson at the start of that conversation, presumably to make it appear responsive to subpart (e) of the Request. By that means Defendants evade a specific denial (which would be false) and volunteer an admission that does not meet the substance of the Request. When I first introduced myself on March 25, Mr. Wilson remarked that as I probably knew, the Union-Tribune did much research of its own in the San Diego market, but that he was "always interested in proposals from any other source that might be of benefit to the newspapers and their advertisers. Tell me more about it." I explained the nature of our basic research in retail markets and the objectives of the J. C. Penney demonstration project and asked if the Union-Tribune was interested in participating in it. Mr. Wilson said yes and then asked: "How do you want to proceed?"

4. After reviewing materials sent to me by the Union-Tribune, I spoke again to Mr. Wilson on April 15, 1988, about the J.C. Penney project. I told Mr. Wilson that I believed San Diego would be a suitable market for the project and asked if the Union-Tribune had finished reviewing the materials I had sent after our first conversation. Mr. Wilson replied he had several people "looking them over" and that if the proposals were sufficiently profitable for the newspapers they would consider paying for the research. I explained to Mr. Wilson that the project had reached the stage where both Market/Media and J. C. Penney would have to begin committing substantial resources to it and that we needed a firm commitment from the newspapers. We spent another 10 to 15 minutes discussing what Mr. Wilson meant by "sufficiently profitable". He explained that he wanted some assurance that, if the newspapers spent the money for the research portion of the project, enough additional advertising revenue would be forthcoming to recover the costs. I told Mr. Wilson that I would talk to Mr. Walker about what assurance J.C. Penney might be willing to give the Union-Tribune with respect to additional advertising revenue and suggested that we meet to go over the details of the project. At that point, Mr. Wilson replied that a meeting was unnecessary, because if J.C. Penney wanted to do the project, and if it made economic sense for the newspapers, the Union-Tribune would do it. It was to this offer that subpart (b) of Request No. 7 refers. Mr. Wilson then told me to proceed with development of the J.C. Penney demonstration project

proposal and to present any additional propositions I thought would be of benefit to the newspapers in the form of options.

5. Telephone bills showing the dates of the March 25 and April 15, 1988, telephone calls referred to in Request Nos. 5 and 7 were provided to Defendants on September 25, 1990.

6. The UPS shipping documents referred to in Request No. 9 were furnished to Defendants on September 25, 1990.

7. The list of stores and locations referred to as Exhibit "F" in Request No. 15 was furnished to Defendants on November 29, 1990. The list is genuine. Plaintiff had no notice the list was missing from the First Discovery Requests prior to service of Defendants' Responses on November 26, 1990.

8. The original of the letter referred to in Request No. 17 is and always has been available for inspection by the Defendants. If a copy was furnished instead of the original, the original would have been produced anytime the Defendants had asked. They never mentioned the matter prior to serving their Response. The letter is genuine, and the original was produced on January 30, 1991.

9. I have read the portion of the Brief in Support of Plaintiff's Motion to Compel, etc., relating to request No. 51. The facts set forth therein are true and accurate and are the facts I have testified to in my deposition so far as the questions asked elicited them. The characterizations of my testimony in the Defendants' reply letter of December 20, 1990, are neither true nor accurate.

/s/ Robert E. L. Rhodes, III
ROBERT E.L. RHODES, III

SWORN to, acknowledged and subscribed in my presence, this 21st day of February, 1991.

(STAMP) /s/ Owen C. Neff
NOTARY PUBLIC

UNION-TRIBUNE PUBLISHING CO.
(Letterhead omitted in printing)

MEMO

TO: Dick Applegate DATE: 3/4/88

FROM: Lloyd Chapman

RE: J.C. Penney Company

You, Gerry Wilson, and I met with Larry Walker, Regional Advertising Manager. We covered the following subjects:

. Cash Book
. Competitive Linage Figures
. San Diego Regional Shopping Center Report
. San Diego Plus
. Preprint Circulation

Gerry queried Larry in depth as he expounded on his theories of how the newspaper industry could help the J.C. Penney Company. Larry's primary concern is to have:

1.60% household coverage.

2.A flat insert rate of $30M

3.CPM spread between a 6 Std. ROP and a 6 Std. insert of 25%

Larry also informed us that there was no corporate stance against the use of the TMC package.

John Fiske, the Sales Promotion Manager who has been calling the shots locally, will be moved to other duties, as the advertising will be coming camera ready from the regional headquarters in Buena Park.

Larry would also like to have no more inserts than the 54 issued by corporate each year. Penneys ran 93 inserts in 1986, and 80 in 1987. This would mean more ROP linage if Larry has his way.

Larry also mentioned the Bob Rhodes Marketing Company. He considers Bob a newspaper-friendly marketing genius, and promised to send Gerry further information on how to contact him.

In the meeting (which lasted over two hours) a wide range of subjects were discussed, from the budget of 4.6% of sales to advertising in San Diego to the approximate 5.8% of sales to advertising in the Bay area.

Larry discussed a lot of industry information that was of particular interest at Jerry's level. It was an informative call.

LC:jk

OVERVIEW OF PROPOSAL TO JC PENNY (sic) AND
THE SAN DIEGO UNION-TRIBUNE
BY MARKET MEDIA RESEARCH, INC.

Robert Rhodes of MMRI proposes:

To do a telephone survey of 8,200 householders. That is one percent of the number of households but only .35 percent of the total population. The cost per interview will be $17.50, which totals $143,500 for the project. Anything beyond the initial analysis will cost $50 per hour.

The questions to be asked in the survey is (sic) not known. The data will be used to prepare a "Formal Demonstration Project Plan" in the stores in San Diego County. The objective is to show how advertising can increase performance. Given this objective, the 10 minute interview will yield information about a person's reading habits, ad response patterns, opinion of JC Pennys (sic), basic demographics, etc (a tall order to fill in 10 minutes, especially in a phone survey. Also, if anyone has different responses to advertising, then their sample of 8,200 is too small).

Apparently, they will then come up with an index of the potential of the area, compare that to the activity of the area (using JCP credit card users (a valid measure?)), and develop a plan to achieve full profitability potential. This would include four steps (to be billed at $50 per hour + $800 for computer fees + fee for Traffic Monitoring Devices (whatever that is, not specified) + travel expenses):

1. OPTIMIZE REACH. To determine the percent of non-subscribers and from that determine the amount that should go into ROP & Pre-prints.

2. OPTIMIZE ADVERTISING PRESENCE. How much to spend on ads. To determine the frequency or size of the advertisement to pull in the potential customer, assumedly given the area's "ad response pattern".

3. OPTIMIZE RATIO OF AD EXPENSE TO SALES. Take the above (2), put it over sales, and presto. Optimality cannot be determined from this because it concerns price and advertising elasticities. This can only be accomplished by using a control group that exclusively uses credit cards (without their knowing) over a period of several years.

4. OPTIMIZE PRODUCTIVITY OF JCP ADVERTISING. This proposes a content analysis of the ads. Is this supposed from the survey also? The right ad content for each store trading area? Not possible!

The crux of the proposal is that MMRI will undertake an effort to measure the response of a store's trading area to different types of advertisements (ROP and Pre-prints), and from this come up with a optimal ad vehicle strategy.

It is doubtful that this can be done over the phone at all. This would take a socio/psychological test to be achieved. In addition, there are not only many different "reaction types" in a store trade area, it would not be economically possible to develop a different strategy for each store.

## SYNOPSIS OF DISCUSSION WITH ROBERT RHODES OF MARKET/MEDIA RESEARCH, INC. ON RESEARCH PROPOSAL FOR THE UNION-TRIBUNE AND JC PENNY (sic)

A number of questions remained outstanding as to the methodology of MMRI's proposed research project for JC Penny (sic) that would supposedly yield the Union-Tribune $300,000 in net ROP revenues.

MMRI's research would entail getting information on ad response patterns, store patronization (by 30 merchandise lines), store image, newspaper readership, and basic demographics. It is not likely that this could take place in the quoted 10 minutes.

The date would be entered into a statistical database called "ACROSS" which would have the ability for crosstabs, etc. There is no special proprietary econometric model.

His plans to measure "Actual" vs. "Potential" buyers would entail the following. "Actual" buyers are those persons surveyed who actually bought a certain merchandise product from JC Penny within a certain time period. "Potential" buyers are those persons surveyed who listed JC Penny as their first or second choice in department stores for the purpose of a certain merchandise product. 1 - the percent of actual to potential buyers would yield the factor by which to increase ROP advertising (apparently regardless of the ad response findings, and appropriate ad mix).

The "Traffic Monitoring Device" mentioned would be a "transducer" or device that would measure the traffic going into the store and separate merchandising areas (such as a light beam or sensor panel under the rug). This would be compared to the specific merchandise being advertised that week to gauge ad performance.

It is our opinion that MMRI should not be retained for this project or as a consultant. For the most part, our internal studies already cover most of what was proposed. the rest of what he is proposing is non-sense or can be accomplished by ourselves.

**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF OHIO**
**EASTERN DIVISION**

**JUDGE ALVIN I. KRENZLER**
**CASE NO. 1:90CV1586**

MARKET/MEDIA RESEARCH, INC.
Plaintiff

-vs-

UNION-TRIBUNE PUBLISHING CO., et al.
Defendants

MOTION FOR RECONSIDERATION AND
LEAVE TO FILE AN AMENDED COMPLAINT

The Plaintiff, by and through Counsel, moves the Court for an Order Reconsidering the Memorandum and Order of February 27, 1991 and for Leave to File an Amended complaint. These motions are supported by the memorandum, Affidavits and Exhibits attached hereto and incorporated herein by reference.

SNYDER, NEFF AND CHAMBERLIN
By /s/ Owen C. Neff
OWEN C. NEFF 0034210
1648 Hanna Building
1422 Euclid Avenue
Cleveland, Ohio 44115-2001
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**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF OHIO**
**EASTERN DIVISION**

**JUDGE ALVIN I. KRENZLER**
**CASE NO. 1:90 CV 1586**

MARKET/MEDIA RESEARCH, INC.
Plaintiff

-vs-

UNION-TRIBUNE PUBLISHING CO., et al.
Defendants

SECOND AMENDED COMPLAINT
(JURY DEMAND)

Plaintiff, leave of Court having first been obtained, files this its Second Amended Complaint.

JURISDICTION

1. Jurisdiction in this Court is founded on diversity of citizenship and an amount in controversy exceeding $50,000.00, exclusive of interest and costs, pursuant to 28 U.S.C. 1332.

2. Jurisdiction over the persons of the Defendants is invoked pursuant to four provisions of Ohio's long-arm statute R.C. 2307.382(A)(1), R.C. 2307.382(A)(3), R.C. 2307.382(A)(6) and R.C. 2307.382(A)(7).

PARTIES

3. Plaintiff is an Ohio corporation engaged in the business of providing research, marketing and management consulting services to business clients.

4. Defendant THE COPLEY PRESS, INC., is an Illinois corporation with its principal place of business in LaJolla, California. THE COPLEY PRESS is an interstate publishing conglomerate which publishes newspapers in Illinois, and California and operates a national news service.

5. Defendant UNION-TRIBUNE PUBLISHING CO. is an unincorporated operating division of THE COPLEY PRESS, INC., through which COPLEY publishes its San Diego newspapers.

## FIRST CLAIM FOR RELIEF

### COUNT ONE

6. Paragraphs 1-5 are incorporated by reference.

7. On April 15, 1988, after more than two weeks of negotiations by mail and telephone between the UNION-TRIBUNE in California and Plaintiff in Ohio, the Defendant made a unilateral oral offer to pay Plaintiff for a research study and demonstration project for the J.C. PENNEY CO., Inc., provided that Plaintiff submitted a proposal for the project acceptable to J.C. PENNEY and profitable to the newspapers.

8. Over the next six weeks Plaintiff developed its proposal, submitted the proposal to J.C. PENNEY and obtained from J.C. PENNEY a commitment to increase its advertising expenditures in the UNION-TRIBUNE by more than $300,000.00 to pay for the project.

9. On May 24, 2988, J.C. PENNEY approved the final draft of the proposal and the draft of the cover letter to be sent to the UNION-TRIBUNE describing the method by which J.C. PENNEY would increase its advertising expenditures in the UNION-TRIBUNE to pay for the research project.

10. On May 24, 1988, Plaintiff sent to Defendant the letter and proposal approved by J.C. PENNEY. The oral contract of April 15, was thereby fully performed and Defendant was obligated to pay Plaintiff the costs of the J.C. PENNEY research project up to the amount of the incremental profit on the additional $300,000.00 in advertising revenue, approximately $210,000.00.

## COUNT TWO

11. Paragraphs 1-10 are incorporated by reference.

12. During the course of negotiations, the parties discussed other services that could be provided by Plaintiff to Defendant making use of the data collected for the J.C. PENNEY project.

13. Defendant asked Plaintiff to present any additional services Plaintiff believed would benefit the newspapers as options which the Defendant could choose later.

14. Enclosed with the May 24, 1988, letter and the approved J.C. PENNEY project proposal was a copy of Plaintiff's Services Agreement which contemplated an on-going relationship between the parties. The Services Agreement spelled out the costs of the first phase of the J.C. PENNEY project and specified the manner in which Defendant would be billed and pay for those costs. It also presented as options services Plaintiff could provide for other UNION-TRIBUNE advertisers. A copy of the Services Agreement is attached as Exhibit "A".

15. According to the language of the Services Agreement, the agreement was deemed "made at Cleveland, Ohio ... between MARKET/MEDIA RESEARCH, INC., an Ohio corporation" and the Defendant. The language expressed the intent that the agreement be regarded as one made in Ohio by a foreign corporation with an Ohio corporation.

16. In the course of negotiations, the parties discussed ways in which the data collected for the J.C. PENNEY project could be used to generate one or more of the UNION-TRIBUNE'S regular research reports without duplicating the field work. These projects were managed for the UNION-TRIBUNE by the corporate staff of THE COPLEY PRESS.

17. In a telephone conversation on July 15, 1988, the UNION-TRIBUNE asked if Plaintiff would be willing to modify the Services Agreement so that the COPLEY PRESS could contract with a field service for the interviewing and pay MARKET/MEDIA a consulting fee. Plaintiff agreed that such a modification would be acceptable. Defendant reaffirmed its intention to go forward with the project and said that THE COPLEY PRESS would handle the details from that point onward.

18. Further detailed negotiations took place with the COPLEY PRESS concerning the coordination of the J.C. PENNEY project with other ongoing research for the UNION-TRIBUNE. Plaintiff and the COPLEY PRESS agreed to cooperate fully to eliminate duplication and unnecessary costs.

19. In the course of these negotiations, the possible modification of the Services Agreement suggested on June 15, was dropped and thereafter the Defendant expressed its intent to go forward with the project both to Plaintiff and to J.C. PENNEY, thus indicating their acceptance of the terms of the Services Agreement as submitted on May 24, 1988. No other objection to the terms of the Services Agreement or suggestion for modification was ever made by the Defendant.

20. On or about September 6, 1988, the Defendant first indicated an intention to breach the contract with Plaintiff in a telephone conversation between the UNION-TRIBUNE and MARKET/MEDIA. Actual breach occurred when Plaintiff received from THE COPLEY PRESS a letter dated October 3, 1988.

THIRD COUNT

21. Paragraphs 1-20 are incorporated by reference.

22. The Defendants, in bad faith, first knowingly delayed the implementation of the J.C. PENNEY project, thereby preventing Plaintiff's further performance under the contract and destroying the right of Plaintiff to receive the full fruits of its bargain, and then denied in bad faith that the Defendants are contractually obligated to Plaintiff.

SECOND CLAIM FOR RELIEF

FIRST COUNT

23. Paragraphs 1-22 are incorporated by reference.

24. Defendant falsely and knowingly represented to Plaintiff that it would pay for Plaintiff's services, intending that Plaintiff should rely on its promise.

25. Plaintiff did rely on Defendant's promise and spent several months developing the research study and obtaining from the J.C. PENNEY CO. a commitment to increase its advertising in Defendant's newspapers to defray the costs of the research. Plaintiff was compelled to forego all other work to perform these services for Defendant.

26. Plaintiff was damaged and suffered substantial financial loss as a result of Defendant's deceit and fraud.

SECOND COUNT

27. Paragraphs 1-16 are incorporated by reference.

28. Defendant obtained Plaintiff's services by deception in violation of R.C. 2913.02(A)(3) and converted them to its own use and benefit. Plaintiff was deceived by communications directed to Plaintiff in Ohio.

THIRD COUNT

29. Paragraphs 1-28 are incorporated by reference.

30. Defendant represented to J.C. PENNEY that it could perform the services outlined in Plaintiff's proposal itself and attempted to obtain the $300,000.00 advertising revenue increase by undertaking to do the research for J.C. PENNEY which Plaintiff had contracted to do, offering to lower its advertising rates for J.C. PENNEY as an inducement.

THIRD CLAIM FOR RELIEF

31. Paragraphs 1-30 are incorporated by reference.

32. Defendant, as a result of its wrongful conduct, has enriched itself unjustly at the expense of the Plaintiff, receiving a benefit from Plaintiff's services for which Plaintiff has not been paid.

## FOURTH CLAIM FOR RELIEF

### FIRST COUNT

33. Paragraph 1-32 are incorporated by reference.

34. By its wrongful conduct, Defendant has damaged Plaintiff's business relationship with the J.C. PENNEY CO. resulting in further loss of earnings.

### SECOND COUNT

35. Paragraphs 1-34 are incorporated by reference.

36. By its wrongful conduct, Defendant has damaged Plaintiff's good will with the Newspaper Advertising Bureau and within the publishing industry resulting in further losses of earnings.

WHEREFORE, Plaintiff demands judgment in favor of Plaintiff and against the Defendants, jointly and severally, for money damages sufficient to compensate Plaintiff for its actual losses, for punitive damages, for its costs, attorney fees and other necessary and reasonable expenses in this action, and for such other and further relief as to the Court seems just.

Respectfully submitted,

/s/ Owen C. Neff
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**IN THE UNITED STATES COURT OF APPEALS**

**FOR THE SIXTH CIRCUIT**

**CASE NO. 91-3371**

MARKET/MEDIA RESEARCH, INC.,
Plaintiff-Appellant,

-vs-

THE UNION TRIBUNE PUBLISHING COMPANY, et al.

Defendants-Appellees.

## STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Whether the District Court, which determined the issue on written submissions without evidentiary hearing, erred in dismissing this action for lack of personal jurisdiction notwithstanding Plaintiff's prima facie showing of jurisdiction under four separate sections of the long-arm statute and Defendants' failure to "present a compelling case that the presence of some other considerations would render jurisdiction unreasonable."

   A. Whether personal jurisdiction properly lies under R.C. 2307.382(A)(1) over California Defendants who, following extensive negotiations by telephone and mail with Plaintiff in Ohio, purposely entered into a substantial business contract and otherwise incurred obligations to make payments to Plaintiff in Ohio for services to be performed by Plaintiff primarily in Ohio throughout the course of their business relationship and which Defendants subsequently breached in communications directed to Plaintiff in Ohio.

B. Whether personal jurisdiction properly lies under R.C. 2307.382(A)(3) and (7) over California Defendants who committed the torts of fraud and conversion within Ohio by making knowingly false statements to Plaintiff in Ohio by telephone and mail pursuant to a scheme to obtain Plaintiff's services without payment in violation of R.C. 2913.02(A)(3) and 18 U.S.C. 1343 and 1341.

C. Whether personal jurisdiction properly lies under R.C. 2307.382(A)(6) over California Defendants who committed tortious acts in California with the purpose of injuring Plaintiff in Ohio by damaging Plaintiff's business relations with the J. C. Penney Co. and by damaging Plaintiff's good will with the Newspaper Advertising Bureau and others within the publishing industry.

D. Whether the District Court properly overruled Defendants' alternative motion to transfer venue to the Southern District of California when Defendants failed to support their motion with any evidence in the record and when Plaintiff, opposing the transfer, submitted evidence of potential prejudice if the transfer were granted.

II. Whether, in a jury case, the District Court erred in determining the Defendants' Motion to Dismiss prior to trial when the "disputed jurisdictional facts are intimately intertwined with the parties' dispute on the merits."

A. Whether the District Court disregarded settled procedural law in this Circuit, most recently set forth in Serras v. First Tennessee Bank Nat. Assn., 875 F.2d 1212, 1213-1216 (6th Cir. 1989), by accepting as true the deliberate, systematic and repeated misrepresentations of material facts in the Defendants' pleadings, motions and other papers when these statements were specifically contradicted by Plaintiff's affidavits and by Defendants' own admissions and were wholly unsupported by evidence in the record.

B. Whether the District Court erred in failing to rule on Plaintiff's pending Motion to Compel Discovery, to Deem Matters Admitted and to Impose Sanctions when Defendants had given incomplete, evasive and prevaricating Responses that resulted in admission of most of the material jurisdictional facts as a matter of law, had withheld material documentary evidence and had failed to give "full and honest" answers to pertinent interrogatories.

C. Whether the District Court erred in overruling Plaintiff's Motion for Reconsideration and Leave to File an Amended Complaint in which Plaintiff documented material misrepresentations of fact made by the Defendants and adopted by the Court in its Memorandum of Opinion dismissing this action.

**IN THE UNITED STATES COURT OF APPEALS**

**FOR THE SIXTH CIRCUIT**

**CASE NO. 91-3371**

MARKET/MEDIA RESEARCH, INC.,
Plaintiff-Appellant,

-vs-

THE UNION TRIBUNE PUBLISHING COMPANY, et al.
Defendants-Appellees.

**REPLY BRIEF**
**TABLE 1**

| DEFENDANTS' BRIEF: | DISTRICT COURT'S OPINION: |
|---|---|
| On or about October 6, 1987, Media, through its President Robert E. L. Rhodes (hereinafter "Rhodes") contacted Larry E. (sic) Walker (hereinafter "Walker") of J.C. Penney in San Diego, California. (Diary of Rhodes, attached hereto and incorporated herein as Exhibit "B" at pages 000157-000157.) Rhodes' first contact with Walker was by phone. Eventually, on or about October 29 and 30, 1987, Rhodes went to California to meet with Walker to discuss the possible sale of Media's services to J.C. Penney in the San Diego | On or about October 6, 1987, the plaintiff through its president, Robert Rhodes, contacted Larry E. (sic) Walker of Penney in San Diego, California, first by telephone and then in person. R. 35: at 3.<br><br>Rhodes placed telephone calls to Walker of Penney and Wilson of the Union-Tribune concerning his proposed research study to be undertaken in San Diego County, California. Id. |

| DEFENDANTS' BRIEF: | DISTRICT COURT'S OPINION: |
| --- | --- |
| area. R. 14: at 3. | |
| *** | |
| ...Rhodes proposed and described a research study to be undertaken in San Diego County, California. The goal of that study was to show J.C. Penney and The Press that certain changes in advertising to be recommended by Media would increase J.C. Penney's retail sales and The Press' advertising revenues. (Wilson Affidavit, Exhibit "E", paragraph 4.) Id. at 4. | The goal of the study was to show Penney and the Copley Press that certain changes in advertising to be recommended by the plaintiff as a result of the proposed study would increase Penney's retail sales and the newspaper's advertising revenues. Id. |
| Rhodes called Walker in Buena Park again on April 11, 1988 to inquire about the status of Media's proposals. (Rhodes' Diary, Exhibit "B" at page 000178; Rhodes' phone records, Exhibit "D" at page 000051.) Rhodes called Wilson again on or about April 15, 1988 and suggested a meeting to take place in California to discuss Rhodes' proposals in detail. (Media Request for Admission, Interrogatory No. 7, Exhibit "C" at page 10; Rhodes Diary, Exhibit "B" at page 000179.) Id. at 4-5. | Rhodes made several calls to Wilson to inquire about the proposal. Id. |
| On or about May 24, 1988, Rhodes sent a written proposal (Proposed Services Agreement, Exhibit "A" to Plaintiff's Complaint and Exhibit "F" hereto.) to Wilson in California. (Wilson Affidavit, Exhibit "E", paragraph 8.) Id. at 5. | Rhodes sent a written proposal to Wilson in California. Id. |

DEFENDANTS' BRIEF:

That written proposal was never executed nor accepted by The Press. (Id. at paragraph 8.)

At some point, Rhodes advised The Press that J.C. Penney would not pay for the study. Rhodes proposed, however, that the Union-Tribune pay for the study out of revenues to be received from J.C. Penney. (Wilson Affidavit, Exhibit "E", paragraph 5.) Wilson indicated that the Union-Tribune might be interested in learning more about Media's proposal but at no time did the Union-Tribune or Copley Press ever promise Media that it would pay for a research study in San DiegoCounty. (Wilson Affidavit, Exhibit "E", paragraphs 6 and 7.

The services which Media proposed were to be performed in San Diego, California. These services were intended to improve the profitability of J.C. Penney stores in San Diego.

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Media has alleged that the proposed Services Agreement "was executed in Cleveland, Ohio." (Complaint, para. 7.) However, the proposed Services Agreement was never executed. (Wilson Affidavit, Exhibit "E", paragraph 8, see also unexecuted

DISTRICT COURT'S OPINION:

That written proposal was never executed nor accepted by the defendants. Id.

Subsequently, Rhodes advised the defendants that Penney would not pay for the proposed study and Rhodes proposed that defendants pay for the study out of revenues to be received from Penney. Id. at 3-4.

The services which the plaintiff proposed were to be performed in San Diego, California, and were intended to improve the profitability of Penney stores in San Diego. Id. at 4.

The plaintiff contends that the proposed services agreement was executed in Cleveland, Ohio, as alleged in the complaint. However, the proposed service agreement was never executed by the parties. Id.

DEFENDANTS' BRIEF:

copy of Services Agreement Attached to Media's Complaint as Exhibit "A".)

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When The Press did not immediately sign the Services Agreement, Rhodes initiated repeated phone calls to Walker in San Diego and The Press in LaJolla and/or San Diego to try and push his proposal and obtain an executed agreement. (Wilson Affidavit, Exhibit "E", paragraph 9; Media Requests for Admission, Exhibit "C", Interrogatories Nos. 19, 22, 27, 28, and 35 at pages 17, 21, 25, 26, and 33; Rhodes' phone records Exhibit "D" at pages 000054, and 000056.) He was not successful.

On September 7, 1988 Media billed The Press $71,750.00 for services which it alleges were performed pursuant to the Services Agreement. The Press responded through its General Counsel denying any contract and refuting any obligation to pay for Media's purported services. Id. at 6.

DISTRICT COURT'S OPINION:

Subsequently, when the defendants did not sign the agreement, the plaintiff billed the defendants in the amount of $71,750.00 for services which it alleges were performed pursuant to the services agreement. The defendants responded by denying any contract and refuting any obligation to pay for the plaintiff's services. Id.